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Supreme Court of the United States

OCTOBER TERM, 1960

No. 83

THE UNITED STATES OF AMERICA, EX REL
ROGER TOUTY, PETITIONER,

vs.

JOSEPH E. EAGEN, WARDEN, ILLINOIS STATE
PENITENTIARY, JOLIET, ILLINOIS, AND
GEORGE B. McSWAIN

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR HABEAS CORPUS FILED MAY 11, 1960

HABEAS CORPUS GRANTED OCTOBER 9, 1960

In the
United States Court of Appeals
For the Seventh Circuit

No. 9916

**UNITED STATES OF AMERICA, EX REL,
ROGER TOUHY,**

Relator,

vs.

**JOSEPH E. RAGEN, WARDEN, ILLINOIS STATE
PENITENTIARY, JOLIET, ILLINOIS,**

Respondent,

GEORGE R. McSWAIN,

Appellant.

**Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.**

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1 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of May (It being the 2nd day thereof) in the Year of Our Lord One Thousand Nine Hundred Forty-Nine and of the Independence of the United States of America, the 173rd Year.

Present:

Honorable John P. Barnes, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. La Buy, District Judge.
Honorable Elwyn R. Shaw, District Judge.
Honorable William H. Holly, District Judge.
Roy H. Johnson, Clerk.
Thomas P. O'Donovan, Marshal.

Thursday, June 2, 1949.

Court met pursuant to adjournment.

Present: Honorable John P. Barnes, Trial Judge.

2

Petition for Habeas Corpus.

2

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division.

United States of America, ex rel.,
Roger Touhy,
Petitioner,

vs.

Joseph E. Ragen, Warden, Illi-
nois State Penitentiary, Joliet,
Illinois,
Respondent.

No. 48 C 448.

Be It Remembered, that on to wit the 2nd day of April, 1948, the above-entitled action was commenced by the filing of the following Petition For Writ of Habeas Corpus in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to wit:

4

IN THE UNITED STATES DISTRICT COURT.
* * * (Caption—48-C-448) * *

PETITION FOR HABEAS CORPUS.

Motion.

Roger Touhy, the petitioner herein, invokes the Jurisdiction of this Honorable Court, under (28 U. S. C. A. Sec. 451 et seq., and the Fourteenth Amendment of the United States Constitution, seeking his freedom from an unlawful conviction and detention.

Statement of the Case.

Petitioner and others, were indicted for the crime of "Kidnapping for Ransom", on John (Jake the Barber) Factor, under Cause No. 71236, issued out of the criminal court of Cook county. Trial by jury was had, and a verdict of guilty was rendered, petitioner being sentenced to a term of Ninety-nine (99) years' imprisonment in the Illinois State Penitentiary. (Exhibit "A".)

Exhaustion of State Court Remedies.

Writ of Error was brought to the Illinois Supreme Court, and affirmed June 14, 1935; Rehearing denied October 2, 1935. (*People v. Touhy*, 361 Ill. 332.)

Certiorari was never brought to the United States Supreme Court to review the affirmance of the writ of error proceedings; for (a) Petitioner was without counsel or
5 sufficient funds to employ counsel to proceed with his case any farther at that time; and, (b) He was prevented from seeking such a review pro se within the statutory period of limitations, (28 U. S. C. A. Sec. 350) because of the then existing practice of the State of Illinois, through rules and regulations of the Warden of the Illinois State Penitentiary, under which persons incarcerated by the State of Illinois were denied the right of access to the Courts except by counsel hired to represent them. Judicial Notice was thereof taken by the United States Supreme Court in *White v. Ragen*, 324 U. S. 760; *Foley v. Ragen*, 143 F. 2d 774; *People v. Austin*, 329 Ill. App. 276; and in the most recent case of *Rooney v. Ragen*, 158 F. 2d 346, wherein it was held to furnish "ample excuse" for a failure to seek such remedy.

Coram Nobis was filed by petition in the trial court under Docket No. C. N. 72, and dismissed October 24, 1946; the Court holding inter alia, the five (5) year period of limitations having long since expired in which to bring such action.

Appeal was brought from the Coram Nobis proceedings to the Illinois Supreme Court, which affirmed the case March 19, 1947; Rehearing denied May 19, 1947; that Court also holding the remedy of Coram Nobis to be foreclosed to him, due to the five (5) year period of limitations having expired. (*People v. Touhy*, 397 Ill. 19.)

Certiorari was sought in the United States Supreme Court, to review the affirmance of the Appeal in the Illinois Supreme Court, in the October 1947 Term, and denied without opinion, October 20, 1947. (*Touhy v. Ragen*, Cert. No. 278.)

Habeas Corpus was sought in the Criminal Court of Cook County, and denied without opinion.

Habeas Corpus was sought in the Circuit Court of Will County, and denied without opinion.

Habeas Corpus was sought in the Illinois Supreme

Court, which was dismissed without opinion, February 18, 1938. (*Touhy v. Ragen*, No. 24616.)

6 Certiorari was sought in the United States Supreme Court, to review the denial of the Habeas Corpus petition, which was denied without opinion, March 28, 1938. (*Touhy v. Ragen*, 303 U. S. 657.)

The petitioner has now exhausted every available state court remedy provided by the State of Illinois, and contends that where resort to state court remedies has failed to afford a full and fair adjudication of the Federal contentions raised, either because the State affords no remedy, see *Mooney v. Holohan*, 294 U. S. 103, 115, or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate, cf. *Moore v. Dempsey*, 261 U. S. 86; *Ex parte Davis*, 318 U. S. 412, a Federal Court should entertain his petition for habeas corpus, else he would be remediless. In such a case he should proceed in the Federal District Court. *Ex parte Hawk*, 321 U. S. 114; *Rooney v. Ragen*, 158 F. 2d 346.

A Federal Question of substance is properly before this Court, petitioner claiming he has been convicted in violation of the "Due Process" clause of the Fourteenth Amendment to the United States Constitution.

The State of Illinois, a sovereign state, is now summoned on the serious charge of having obtained a conviction by methods so unfair, that a Federal Court must set aside what the state court has contrived. Heretofore, the State of Illinois has had the benefit of a presumption of regularity and legality, and petitioner now accuses the State of Illinois, through its prosecuting authorities and witnesses, of being guilty of perpetrating a fraud upon him, the trial court, and the jury, by Perjury, Fraud, and Suppression of Evidence, which, if given the time and opportunity at the trial, the petitioner could have proven his innocence; but was ~~used~~ used to trial by the court, under circumstances which denied him "Due Process", in violation of the State and Federal Constitutions. A hearing must be afforded the petitioner to prove such charges. *Waley v. Johnston*, 316 U. S. 101; *Walker v. Johnston*, 312 U. S. 275.

7 **Petitioner's Contention at the Trial.**

The petitioner contended that he was innocent of the alleged "kidnapping" of John Factor; that he had never seen or spoken to Factor; that he had never seen or spoken to Isaac Costner; and that false and perjured testimony introduced by the prosecution, accused him of a crime—which he honestly believes never occurred.

The Facts.

In order to fully acquaint the Court with the entire history of petitioner's case, it is necessary that he recite all pertinent facts leading out of his original arrest; the Hamm trial; the first and second Factor trials, etc. The indulgence of the Court is humbly requested, while petitioner briefly enumerates them.

John Factor's Alleged Kidnapping.

During the night of June 30 - July 1, 1933, after one o'clock A. M., John Factor's family telephoned the Chicago Police, that Factor had been kidnapped near the Dells, west of Evanston; where he had been gambling. \$70,000 or \$75,000 was later claimed to have been given a messenger, and after twelve days Factor stepped out of a car on a LaGrange street, clean and meticulously dressed, and his family came out from Chicago in response to a telephone call, returning him to his home. Newspapers quoted local British authorities as skeptical about the kidnapping stories.

Petitioner's Original Arrest.

Peter Stevens, William Sharkey, Edward McFadden and petitioner, were placed under arrest at Elkhorn, Wisconsin, July 19, 1933, while returning home from a fishing trip. They were arrested without warrants and apparently for no crime, since they were never accused of any wrongdoings. The following day, July 20, 1933, Government Agents transported all of the abovementioned persons to Chicago, and held them incommunicado in the Banker's Building and in the Chicago Detective Bureau, where they were viewed by various victims of reported and alleged crimes,—John Factor being among said per-

Petition for Habeas Corpus.

sons. No identifications or accusations were made at that time by Factor or anyone else, which would tend to implicate petitioner in any crime.

Petitioner Charged With Crime.

At two o'clock on the morning of July 27, 1933, Stevens, Sharkey, McFadden and petitioner, were transported by Federal Agents in an automobile, to the City of Elkhorn, Wisconsin, against their will and without benefit of counsel or hearing, where a Federal Warrant was read to them, charging them with the Kidnapping for Ransom, of one Alfred Hamm, Jr., of St. Paul, Minnesota.

Petitioner's Removal to Milwaukee, Wisconsin.

July 27, 1933, the same day petitioner was charged with the kidnapping of Alfred Hamm, Jr., he and his co-defendants were removed to Milwaukee, Wisconsin, where they remained for about five or six weeks, during which time, petitioner was denied the right to consult with or retain counsel, being subjected to constant physical and mental torture, sustaining therefrom permanent injuries, viz., a fractured vertebra; two teeth knocked out; seven teeth being loosened, which were subsequently extracted, due to their malformed regrowth; a serious rupture; and his nerves were shattered from being awakened and thrown with great force to the cement floor every fifteen minutes.

Five or six weeks after the warrant had been read to him in Elkhorn, Wisconsin, Stevens, Sharkey, McFadden and petitioner, were taken before a United States Commissioner in Milwaukee, who ordered their removal to St. Paul, Minnesota.

The Hamm Trial.

November 8, 1933, Stevens, Sharkey, McFadden and petitioner, were placed on trial for the kidnapping of Alfred Hamm, Jr. Public sentiment—the result of poisonous news items—was running rampant, mobs forming daily around the jail, shouting: "We want the kidnappers! We want Touhy!" During the trial, John Factor was in constant attendance, except for the time required by him to appear before the Cook County Grand Jury at Chicago, Illinois, and cause the indictment of Stevens, Sharkey, McFadden and petitioner, for his alleged

"kidnapping." Factor and the government prosecutor occupied adjoining suites in a St. Paul hotel.

November 29, 1933, Stevens, Sharkey, McFadden and petitioner, were acquitted of the Hamm kidnapping, being able to expose the perjured testimony of one Walter Bowick, a star witness, produced by Capt. Daniel A. Gilbert, head of the State's Attorney's police detail of Chicago, Illinois. Attorney William Scott Stewart appeared for the petitioners.

Fifteen (15) witnesses, fellow employees who worked with Bowick in a Chicago newspaper plant during the time he claimed to have been in St. Paul and allegedly witnessed certain facts concerning the kidnapping, testified that he was at work in Chicago, and that it would have been humanly impossible for him to have been in both places at one and the same time.

The four defendants in this trial had been so maltreated in jail, that Sharkey became insane and committed suicide in his cell a few hours after his acquittal; a second died shortly thereafter; a third broke down physically and mentally, never fully recovering; and the petitioner suffered the injuries mentioned. McFadden made several attempts to commit suicide before and after the Hamm trial, and he was constantly guarded. Yet McFadden was acquitted on this and the subsequent trial—as Innocent!

Two years after the Hamm trial, the real kidnappers of Alfred Hamm, Jr., were arrested. They are Alvin Karpis and his associates, who confessed, pleaded guilty, and were sentenced to Life imprisonment, and are now confined in Alcatraz penitentiary.

10 Alvin Karpis named John (Jake the Barber) Factor and one Gus Winkler in his confession, as the men who changed the Hamm ransom money, amounting to \$100,000, in a transaction taking place in the Chez Paree, a night club in Chicago. Also present was one Goetz, alias Saunders, named as one of the Hamm kidnappers.

The First Factor Trial.

December 8, 1933, Stevens, McFadden and petitioner, waived extradition and were removed to Chicago, Illinois, to stand trial for the alleged Factor "kidnapping", wherein \$70,000 or \$75,000 supposedly was paid as ransom money. The indictment was returned November 8, 1933, the same day the Hamm trial commenced.

Petition for Habeas Corpus.

Petitioner had been led to believe by his attorney, William Scott Stewart, and by the Cook County authorities, that he would not be placed on trial in the Factor matter, since John Factor had not identified him at the Chicago Detective Bureau.

Prior to petitioner being placed on trial, Judge Feinberg, without request or authority of law, had appointed the Public Defender of Cook County to appear as petitioner's counsel. This appointment was made at a time when Mr. Stewart was on vacation, between the time of the Hamm trial and January 7, 1934.

Since petitioner did not desire the Public Defender's assistance, his relatives appealed to one Aaron Gerch, an attorney working in conjunction with a lawyer tenant in Mr. Stewart's offices, to file his appearance for petitioner, while Mr. Stewart was on vacation in Florida and Cuba.

When Mr. Stewart returned from his vacation on January 7, 1934, he found the case set for disposition of preliminary motions on January 8, 1934. Mr. Stewart did not refuse to appear for petitioner and his co-defendants, since he was given a retainer of \$3,500 and a promise of the balance before the trial concluded, and that it had been insinuated by the press that the vacation taken by Mr.

Stewart was merely for the purpose of delaying the prosecution, in order that Factor might be returned to England by force of the extradition warrant, and that the prosecution might thereby be defeated.

The trial began January 16, 1934, ending in a mistrial February 3, 1934. Judge Feinberg arbitrarily discharged the jury, over the objections of the defense, after they were out about twenty-five (25) hours, standing ten to two for acquittal. Judge Feinberg was in constant touch with the jury and knew how they stood—in fact, it was common knowledge throughout the court room as to this.

The defendant McFadden was discharged before the case was given to the jury, after a doctor and two nurses for the Oak Park Hospital produced records and testified that McFadden was a patient therein during the time Factor claimed he was held prisoner by the kidnappers, claiming McFadden to be one of those men. This is the same McFadden, who was also found Not Guilty in the Hamm trial!

During this trial, Mr. Stewart sent Thomas Meehan and Stanley Chidley, two of petitioner's witnesses to a room in

the LaSalle Hotel, telling them he would interview them there—but instead, they were greeted by the State's Attorney's police and locked up. These men were coerced and intimidated into not testifying for petitioner and told to stay away from the trial.

Thomas Meehan worked as a gardener for petitioner about three years, and was aware of petitioner's whereabouts during the alleged "kidnapping", and was ready and willing to testify thereto. This incident came to petitioner's attention during the trial, and on questioning Mr. Stewart, he told petitioner he had occupied the same rooms a week previously and it slipped his mind that he had checked out, and it was quite a coincidence that Capt. Gilbert and his police had the same rooms.

The storm broke when petitioner learned this, and from that point on, Mr. Stewart stayed away from petitioner completely during this trial, becoming more and more intoxicated during the case, and did not give petitioner his full and effective assistance of counsel.

This incident, plus others, proved to petitioner that 12 his counsel was unfaithful, and that was the reason he did not desire his aid in the second trial or on the appeal.

Thomas Meehan was intimidated into staying away from the trial. Capt. Gilbert and Mr. Stewart certainly saw to it that he did not appear, since his testimony would have aided petitioner.

Stanley Chidley did testify, but he stated that he could not remember petitioner's whereabouts during the time of the alleged Factor "kidnapping", and his testimony was rendered useless to petitioner after the talk Capt. Gilbert had with him at the LaSalle Hotel. It might be added, that Chidley had a wife and five children, and was as poor as the proverbial "church mouse", yet, about a week after petitioner's conviction, he obtained sufficient funds to move to California. It is safe to assume he was paid for his evasive testimony.

The reason Mr. Stewart sent Meehan and Chidley to be interviewed by Capt. Gilbert, is not hard to explain. Since Mr. Stewart imbibed rather freely of intoxicating liquor during the trial, it is entirely possible that he did not know what he was doing, or that he purposely cooperated with the prosecuting authorities to "railroad" the petitioner into the penitentiary, for a crime he did not commit—and which in all probability never occurred.

Father Weber, a Catholic priest of Indianapolis, Indiana, testified for petitioner, stating that he had known him intimately for a period of several years. That he was called upon by Lieutenant Leo Carr of the Chicago Police Department, who was a bodyguard for John Factor, to induce Roger Touhy to act as a go between, when contact would be made with Factor's "kidnappers". Father Weber explained how Roger Touhy flatly told him that he was not interested in such doings and was politely asked to leave Touhy's home. That for the next four or five days he phoned petitioner several times a day to apologize; that petitioner accepted the apology and agreed to forget the whole matter. A transcript of Father Weber's testimony is available. (Father Weber did not appear
13 at the second trial—under orders from his superiors.)

A. L. Epstein, testifying for the prosecution, pointed toward petitioner and others, saying: "They are not the men." Whereupon, Assistant State's Attorney Crowley, called Mr. Epstein a dirty name out loud in the court room. A recess was immediately had, and Epstein, Stewart, Crowley, and Judge Feinberg went into the latter's chambers. Fifteen minutes later, Epstein resumed the stand, and committed perjury, testifying now, that he could not identify anyone. Epstein previously claimed that he was with Factor at the time he was taken from the car, and gave a description of two of the men he saw to the police, and said that he could identify them if he ever saw them again.

Reddick, a colored chauffeur of the car in which Factor and Epstein were riding at the time of the alleged "kidnapping", testified that the men who stopped his car were guards at the Dell's Road House, and were armed with machine guns while in the Dell's yard. This is the same "Dell's", a gambling house, which was operated by the Capone "Syndicate."

Dr. Wolf, an oculist, testified that after one was blindfolded for several days, that it would take about fifteen to thirty minutes before his eyes were accustomed to the light after the blindfold was withdrawn, so that he could identify anyone. John Factor testified that he had a fleeting glance at petitioner the instant a blindfold was removed from his eyes on July 6, 1933, and was able to identify the petitioner from that glance. There can be but one conclusion after reading the testimony of the specialist Dr. Wolf,—that Factor was never blindfolded.

Henrichsen furnished petitioner with a complete alibi for his whereabouts on July 6, 1933, since he testified that he and petitioner were "crow shooting" in the Forest Preserve on that date. Both Henrichsen and Factor committed perjury, since petitioner was not "crow shooting" nor was he present where Factor was at any time between July 1, 1933 and July 12, 1933.

When ransom money is paid, it is elementary that 14 the bills are marked or their numbers taken—especially where the F. B. I. Agents are called in. It is incredible that, with the shrewd Factor handling the matter of the ransom money from a LaSalle Street broker's office, under the direct supervision of the experienced Melvin Purvis of the F. B. I., and Capt. Daniel Gilbert of the State's Attorney's office, this precaution would not have been observed. Costner swore that he got \$2400 in bills; Henrichsen said he was given \$1000 by petitioner to "buy a car." (Petitioner did give Henrichsen \$1000, but it was in the form of a loan, and took place months before the alleged Factor "kidnapping", being for Henrichsen to buy new furniture. The Chief Bailiff of the Municipal Court removed Henrichsen's furniture from his home for failure to pay installments for more than two years.) Yet, the full amount of money seems simply to have disappeared from the face of the earth, for nothing was ever mentioned to date of its recovery. (Abst. pp. 96, 99, 101, 143, 156.)

Also see: *Chicago Herald-Examiner*, Sunday, May 5, 1935, on the recovery of the \$65,000 Hamm ransom money; and the *Chicago Sun*, Sunday, May 26, 1946, regarding the Edward P. Jones' ransom money; the marked bills and serial numbers.

Just as there was never any "Factor kidnapping", there never was any "ransom money" paid!

Events Prior to the Second Trial.

After the mistrial in the first Factor case, Judge Feinberg ordered a new trial to commence within ten (10) days. This was on February 2, 1934, at 6:15 P. M. Mr. Stewart explained to Judge Feinberg his position in the matter—that he had not been paid his full fee in the first trial, and that there were certain arrangements that he would have to make with the petitioners before he could state whether or not he would be ready for trial—if he was to handle the matter. Judge Feinberg stated he regarded the new trial

as one and the same as the first, and compelled Mr. Stewart to appear for petitioner in the second trial!

15 Judge Feinberg, by letter, requested Mr. Stewart to appear before him on February 9, 1934, and at that time Mr. Stewart was appointed to represent petitioner. Mr. Stewart protested against said appointment and did his utmost to explain his position, and also had a long conference in chambers in the presence of the State's Attorney with Judge Feinberg, but the said Judge insisted upon adhering to his intention to force the case to trial and compel Mr. Stewart to accept the appointment—or go to jail.

Mr. Stewart complained to Judge Feinberg that his full fee had not been paid and that petitioner owned considerable property and a large and valuable estate on River Road in Cook County. Also that the Federal Authorities held some twenty-seven hundred (\$2700) dollars of petitioner's funds, which had been assigned to Mr. Stewart, and that he was ready and willing to waive any claim to said money and permit it to be paid to any other attorney who would handle the trial.

Petitioner filed a petition and affidavit for a change of venue and counsel. (It may be added, that a most recent search has been made of the Clerk's files in the Criminal Court of Cook County, and it seems that this petition was removed,—the reason seems quite obvious.)

Mr. Stewart filed a petition and affidavit also; stating that the Public Defender should be appointed to defend persons unable to employ counsel, unless that person requested other counsel. He stated that petitioner did not desire that Mr. Stewart appear for him. This plea was overruled and Mr. Stewart was compelled—against petitioner's and his own desire—to appear for him, in view of the Court threatening to imprison him for failure to comply with such order. A continuance was sought to prepare for trial, and promptly denied by the Court. (*Exhibit "B"*.)

At the time Judge Feinberg was compelling Mr. Stewart to accept such appointment, Roger Touhy's wife was arranging for other counsel when she was taken ill in the Criminal Court Building and had to go to a hospital, where she underwent a major operation.

16 Petitioner was forced to trial with such expediency and haste that his court-appointed counsel could not (and did not) fully and properly prepare his defense.

Judge Feinberg was most biased and prejudiced against petitioner in that he:

(a) refused to permit Mr. Stewart to withdraw from the case;

(b) refused to hear a motion on double jeopardy;

(c) refused to consider petitioner's affidavit, in which he set forth good and sufficient reasons for desiring other counsel;

(d) refused to consider Mr. Stewart's affidavit, requesting that he be permitted to withdraw from the case;

(e) refused to permit petitioner to have counsel of his own choice, even though he was financially able and willing to employ other and competent counsel, and strongly expressed such desire;

(f) refused to grant a change of venue;

(g) refused to grant a continuance or sufficient time in which to prepare for trial;

(h) refused to permit the jury to deliberate further, at a time when he was aware that they stood ten to two for acquittal; and,

(i) refused to grant petitioner "Due Process of law", in violation of the State and Federal Constitutions.

The Second Factor Trial.

February 13, 1934, Peter Stevens, Albert Kator and petitioner, were placed on trial, just ten (10) days subsequent to the arbitrary discharge of the jury in the first trial.

Several main points of the trial were:

(a) A list of one hundred and one (101) names of witnesses were submitted by the State, yet, the name of Isaac Costner was omitted, and he was produced as a "surprise" witness on the fourth day of the trial. Costner admitted participation in the alleged "kidnapping", mentioning his confederates, among them the petitioner;

17 (b) Costner's testimony greatly aided the State's case by the perjury and fraud he committed, thereby causing petitioner's conviction;

(c) Costner admitted on the stand that he expected "consideration" from the Federal authorities in the then pending mail robbery charge, and by the State of Illinois in the present case, for his testimony in this trial;

(d) Costner was never prosecuted for the alleged "kidnapping" of Factor, even though he confessed to it;

(e) Costner was seen by petitioner for the very first time on the fifth day of the trial, in the court room;

(f) Costner, while testifying for the prosecution, and being examined by Assistant State's Attorney Wilbert Crowley, was asked to identify petitioner, and the following took place:

"Mr. Crowley: Q. Do you know a man by the name of Roger Touhy?"

A. Yes, sir.

Q. Do you see Roger Touhy in the court room?

A. Yes, sir.

Q. Will you point him out, please?

At this juncture of the case, Costner looked helplessly at Kator, Stevens, the petitioner, the jury, the spectators, and at the counsel table, not knowing what to do. It was apparent that he needed help badly. It looked as though he might walk off the stand, for he was most embarrassed, in that he had named his associate in crime—and could not identify him. This went on for several minutes, when *Mr. Stewart, petitioner's own counsel*, came to Costner's rescue, by walking up to petitioner and commanding him to stand up, stating:

"Mr. Stewart: Stand up, Rog."

Since *petitioner's own counsel* had identified him for Costner, the prosecutor quickly took the cue, and countered:

"Mr. Crowley: Is that Roger Touhy?"

A. That is Roger Touhy." (Rec. p. 267.)

(g) That petitioner's counsel never consulted with him at any time before or during the second trial;

(h) That his counsel refused to subpoena vital witnesses in his behalf, even though his counsel had talked with some of them and knew how important their testimony was;

(i) That his counsel closed the trial hastily, and did not give petitioner an opportunity of taking the stand in his own behalf;

(j) That the State's Attorney's police, particularly Capt. Daniel Gilbert, threatened bodily harm to certain important defense witnesses, causing them to refrain from testifying;

(k) That his counsel was continually under the influence of intoxicating liquor during the trial, thereby depriving petitioner of the full and effective assistance of counsel;

(l) That A. L. Epstein, the prosecuting witness, committed perjury in open Court by changing his testimony; and,

(m) That these combined factors deprived petitioner "Due Process of Law", causing an illegal and unjust conviction, contrary to the State and Federal Constitutions.

Mr. Stewart Appeals the Case—Gratis.

Shortly after petitioner's imprisonment, Mr. Stewart visited him and explained that he had filed a Bill of Exceptions. Petitioner expressed his gratitude for this courtesy and favor, but informed him not to proceed any further, and that he was to consider himself dismissed from the case immediately.

Several months later, Mr. Stewart again visited petitioner, and informed him that he had filed an appeal in the Illinois Supreme Court. Again petitioner explained that he did not desire Mr. Stewart as his attorney, and asked him to have his (petitioner's) name withdrawn from the appeal, and desist from further participation in his behalf.

Not knowing whether Mr. Stewart would do as requested, petitioner contacted his family and had them retain Attorney George B. Holmes, of Chicago, for the sole purpose of having petitioner's name withdrawn from the appeal. Mr. Holmes and Mr. Stewart met in Springfield and almost came to blows over the matter of withdrawing petitioner's

name from the appeal. For some reason or other, Mr. 19 Holmes failed to accomplish what he had been retained to do. His failure has never been explained to this very day. The petitioner's family still retain a money receipt from Mr. Holmes for his services to withdraw petitioner's name from the appeal.

Shortly after petitioner's conviction, one Basil Banghart was placed on trial as an accomplice of Roger Touhy in the alleged Factor "kidnapping." Mr. Stewart also appeared for Banghart, but the case went to trial before a different judge and jury. He was also convicted and sentenced to a term of Ninety-nine (99) years' imprisonment.

Banghart never authorized Mr. Stewart to appeal his case, and succeeded in withdrawing his name from the case before it was heard. Petitioner's family and himself, tried in vain to withdraw his name from the appeal—but without success. Mr. Stewart had consolidated both cases for the appeal.

Costner's sister testified that her brother Isaac Costner and Banghart were in Newport, Tennessee, and affidavits were introduced into the records. With Banghart's name off the appeal, the Supreme Court ignored the affidavits from Tennessee. (See *Exhibit "C"* to *"T"* inclusive.) The State's Brief requested that the Court disregard all matters pertaining to Banghart.

The reason for Mr. Stewart's insistence in appealing petitioner's case, when he was not paid for such service, but expressly told to refrain from so doing, is beyond all explanation. Petitioner had intended to retain other counsel to undertake such proceedings, and was financial able at that time, to pay a substantial fee for such legal action by a competent and faithful attorney, of his own choice. The petitioner contended in his other legal proceedings that had he been fortified with the proof of the fraud and perjury committed at his trial, that he would certainly have obtained a reversal. Had petitioner appealed his case at a later date, as was his intention—he would have had all proof necessary to void his conviction. Mr. Stewart's action in appealing the case without petitioner's consent, was a direct violation of Due Process of Law.

The Appeal.

Petitioner sets forth only a few of the outstanding points of the appeal, upon which the Supreme Court of Illinois affirmed, and they are:

Quoting in part from the State's Brief: (p. 54.)

"As we have stated, the only identification made were those made by Factor, Costner, and Henrichsen. We mean by this, identifying the defendants as being so closely related to the facts in respect to the kidnapping as to justify the jury in believing that they took part in the kidnapping." (Emphasis supplied.)

Under another heading, (Newly Discovered Evidence) petitioner sets forth that Factor boasted to a noted attorney of record, Mr. Thomas McConnell, that he falsely identified petitioner as his "kidnapper." Also, that he committed perjury.

Costner was the "surprise" witness, whose name was not among the one hundred and one (101) witnesses furnished the defense before trial. His testimony that he was in Chicago at the time of the supposed occurrences, when

in fact it was disclosed after trial, that he was in Tennessee, (See Exhibits "C" to "T" inclusive) shows that Costner was a person without character, a convicted felon who was used to making "deals", and utterly unworthy of belief. Another witness, Henrichsen, gave somewhat insignificant testimony, also false, and which should have been excluded in its entirety.

(b) Again in the State's Brief: (p. 74.)

"When one considers that some of the *Touhy gang* were pretty well known . . ."

And on (pp. 79-80)

"But we respectfully submit that Costner was no worse than any of the rest of the *Touhy gang* . . . He was a stranger, it is true, in Chicago, and did not know his way about but he was able to tell about many things that he must have learned from association with the *Touhy gang* itself."

And on (p. 92)

"Witnesses were being held (by the State) in hotels to testify, and it must be obvious to this court why some of them, in view of the power, boldness, and desperation of the *Touhy gang*, were so held . . ."

21 Roger Touhy, the petitioner, never had a "gang."

The newspapers and radio announcers let their imaginations run riot. Indexes to local papers are not available, but a few selections from the *New York Times* are quoted:

"*The Touhy gang*," July 19, Nov. 28, 29, Dec. 2, 1933, Feb. 12, 13, 20, 23, 24, 1934.

"*The Touhy mob*," August 13, 1933;

"*Chicago gangster*," November 17, 1933;

"*gang leader*," February 20, 1934;

"*Touhy's gangsters*", Nov. 17, 1933; Jan. 17, Feb. 5, 22, Apr. 4, 18, 1934;

"*Touhy's Chicago gang*," Nov. 17, 1933;

"*the Touhy mob of Chicago*," August 13, 1933.

There is nothing in the trial record to support the basis for assuming that petitioner was part of or had any "gang." Roger Touhy was convicted by false testimony, perjury, and public opinion—and it is most relevant to add, that public opinion was set on fire by false and hypothetical accusations, and that a cruel wrong was done by that public

opinion, in convicting him of a crime which he never committed—and which probably never occurred!

(e) While testifying for the prosecution, and attempting to identify the petitioner, Costner was asked:

“Mr. Crowley: Q. Do you know a man by the name of Roger Touhy?”

A. Yes, sir.

Q. Do you see Roger Touhy in the court room?

A. Yes, sir.

Q. Will you point him out, please?

Mr. Stewart: Stand up, Rog.

Mr. Crowley: Is that Roger Touhy?

A. That is Roger Touhy.”

In abstracting the record, Mr. Stewart stated (Abst. 83):

“I know Roger Touhy, and that is he standing up over there.”

And in the State's Brief, in the Illinois Supreme Court, it is transposed thusly: (p. 16.)

“Costner knew Roger Touhy and pointed him out in the court.” (Abst. 83.)

22 As a matter of fact, Costner and Touhy had never seen each other before. This sole incident will indicate part of the basis for petitioner's dissatisfaction with the conduct of his defense by Mr. Stewart—and why he did not want him to appeal his case. There is no doubt but that the reviewing court relied upon the State's Brief as to Costner's identification of Roger Touhy.

Roger Touhy.

Roger Touhy, from 1929 to 1933, was in the business of supplying beer to taverns in the northwestern suburbs of Chicago. He owned a brewery at Roselle, Illinois, where he made beer and paid a government tax of \$4.50 per barrel. This brewery was a legitimate business and run as such. Beer was then taken from this plant to several illegal breweries, where it was fermented and the alcohol content raised—thus making that latter beer illegal. His business was strictly within the law during 1933, after the Volstead Act was repealed, and he held the exclusive agency for Bismark and Gambrinis beer in the northwestern part of Cook County. His net income was over thirty-five (\$35,000) dollars per year.

That petitioner's business was conducted on a decent level is shown by the fact that neither he nor any of his drivers were ever arrested or charged with any offense. They never carried dangerous weapons of any type—which certainly speaks volumes for the conduct of his business in a peaceable and orderly manner, under the strange conditions of the prohibition era.

Since so much has been written in various publications and leading newspapers throughout the country which is adverse to the petitioner's true character, he believes it advisable and necessary to present this Court with a brief sketch of his past life, from the time he went to work after leaving school in his youth and up to the time he entered prison in 1934, leaving the record speak for itself, from which it will be determined that after full study and investigation thereof, Roger Touhy is not that vicious individual which the newspapers, publications and movies have labeled and pictured him, namely: "The Terrible, gangster, kidnapper, and arch criminal."

Petitioner's Work Record.

Chicago & Alton R. R.)	1912 - 1914
Marshall Field & Co.		
National Biscuit Co.		
Western Union (Telegrapher) Chicago and Denver		1914 - 1917
D. & R. G. R. R. (Telegrapher), Eagle, Colorado		1917
United States Navy (Radio Operator)		1917 - 1919
C. R. I. & P. R. R. (Telegrapher) Des Moines, Iowa		1919
Magnolia Petroleum Co. (Engineer) Yale, Oklahoma		1920 - 1921
Used Car Dealer (for self) Chicago, Illinois		1921 - 1928
Interest in Illegal brewery, Chicago, Illinois		1929 - 1933
		1933 - up to

and including the time of his arrest for the crime now under conviction.

Petitioner's Police Record.

Traffic violation (Chicago, Illinois)	1921
Possession of firearm in home (Titusville, Fla.)	1933

During 1915 and 1916, petitioner worked for the Western Union Telegraph Company, being branch manager of several of its offices in Chicago. He served his country during World War I, being in the Navy from 1917 to 1919, and for more than one year of that time was an Instructor of Radio at Harvard University, at Cambridge, Massachusetts, teaching servicemen. He was discharged from active duty in March 1919, receiving an Honorable Discharge in 1921 by the United States Naval Reserve. His two sons joined the United States Armed Forces during World War II, one serving in the Army and the other in the Navy, both securing Honorable Discharges.

Roger Touhy was never involved in any trouble (prior to his present charge), and was a decent respectable man. His marriage of twenty-six (26) years and as a husband and father, might well serve as an example for his children and others. His wife and sons faithfully stand at his side—knowing him to be innocent of crime.

A Brief Sketch of John Factor.

John (Jake the Barber) Factor, is a son of an itinerant rabbi named Factorovitz and was born in Russia. He had been admitted as an immigrant at the port of Philadelphia, Pennsylvania, along with his father, mother and two brothers in the year 1902. He had taken out his first citizenship papers, but not his second.

Factor is known throughout the world as a "Master Swindler", "Master con-man and despoiler of widows and orphans", and as "Jake the Barber", a man of many aliases, who operated in England under the name of Klien, while in America, he operated Bucket Shops under impressive titles, such as: Ward & Company; J. F. Freeman & Company; and T. J. Henneberry & Company, 100 North LaSalle Street, Chicago, whose business partner was Frank Harris, better known as Murray Humphries, a Capone gambling "Syndicate" hoodlum, and No. 1 man.

Factor, in petitioner's first trial, stated under oath, that he was born in Hull, England. Yet, Factor, in the marriage license bureau, in New York City, had filed an application to marry one Rella Cohen, and in this document he recited under oath, that his place of birth was Chicago, Illinois.

Factor is a swindler on a gigantic scale, at the present

time subject to extradition to England for a seven and one-half million (\$7,500,000) dollar fraud on small British investors. He is at present incarcerated in a Federal Correctional Institution at Milan, Michigan, and serving a ten (10) year sentence for mail fraud. Before fleeing England, Factor sent large sums of money over to the United States, setting up funds of one million (\$1,000,000) dollars each in two Chicago banks, which funds his British creditors located by mere chance and subjected to an ultimate settlement of one million three hundred thousand (\$1,300,000) dollars. The criminal charges against Factor in England were not affected by this settlement with his creditors. It may be observed that the settlement left Factor still six million (\$6,000,000) dollars to the good.

Factor was friendly with the Campone "Syndicate" before, at the time of the alleged kidnapping and continually thereafter. He was reported in the Chicago Tribune of July 2, 1933, to have amassed a fortune of \$5,000,000 since returning to the United States, and to be thought to have contributed \$50,000 to Capone's Defense Fund, a year and a half before.

The extradition warrant for Factor's deportation was issued by the Secretary of State for the United States on January 12, 1932, and which warrant, under the law, was required to be executed within two months. That warrant has never been executed, and Factor still remains in the United States, now in a Federal Correctional Institution, though he is not a citizen of the United States. Factor's full proceedings in the various courts on the extradition warrant, are now reported as: *United States ex rel. v. Mulligan*, 50 F. 2d 687 (1931); 61 F. 2d 626 (1932); and *Factor v. Laubenheimer*, 290 U. S. 276 (1933), 78 L. Ed. 315.

Upon information and belief, petitioner states the fact to be, that said John Factor instigated the "kidnapping" of himself, or that it was a hoax, scheme and devise to postpone extradition proceedings and as a means of eventually defeating the said extradition entirely.

And upon further information and belief, petitioner states the facts to be, that the said John Factor inducted certain persons in the Hamm case, to assert falsely that petitioner had kidnapped Alfred Hamm, Jr., of St. Paul, Minnesota. That by reason of such false accusations the petitioner was indicted in St. Paul, Minnesota, on the

charge of kidnapping Alfred Hamm, Jr.; and that Factor was present during part of the Hamm trial, occupying adjoining suites with a government prosecutor at a St. Paul hotel.

The Gigantic Conspiracy Against Petitioner.

Roger Touhy was in the business of supplying beer to over one hundred taverns in the northwestern suburbs of Chicago. The Capone "Syndicate" controlled the liquor business in all the rest of the Chicago area, and in 1932 and 1933 they began to move into the territory 26 supplied by the petitioner. There was no trouble of any sort, but the "Syndicate" kept pressing in. After petitioner's conviction, the "Syndicate" moved into the territory.

Roger Touhy had received word one day from a teacher in the school which his children attended that they were in danger, and he hired a guard for his house. He was afraid that the "Syndicate" might kidnap his two sons, so he hired one Henrichsen to guard them. Henrichsen had formerly been a county highway policeman. After the petitioner's conviction, Henrichsen went back on the public pay-roll as an investigator for the State's Attorney's office, and still later, worked for the Capone "Syndicate." (He is now dead.) While petitioner did not believe personal harm would befall himself, he took the precaution of protecting his children. This in itself shows how much petitioner feared the Capone "Syndicate", and the ill-will between them. Hence, no doubt, the "Factor kidnapping" hoax was established.

In order to prosecute petitioner, the State's Attorney of Cook County twice went to Washington in person, to secure delay in Factor's extradition, so that Factor might be left in Chicago long enough to testify in the "kidnapping" charge. No move has ever been made to return Factor to England while he remained free, even though the extradition warrant can be reinstated.

Costner's testimony was circumstantial. (Definite proof establishes the fact that he was an unmitigated liar and perjurer, never having been in Chicago during the alleged "kidnapping.") The prosecuting attorney was able to establish a place in Chicago where Costner supposedly lived from July 19, 1933, but not previously. It is interesting to note that Roger Touhy was arrested at Elkhorn, Wisconsin, on July 19, 1933. In questioning Costner at

the trial, as to where he lived, he answered that it was so long ago, that he could not remember where he lived during the period of July 1st to July 12th, inclusive. Yet, this was asked of Costner some six months after he claimed to have lived in Chicago.

Costner was a mail robber who had served a Federal 27 prison term, and is now in a Federal penitentiary:

He was in State custody in Baltimore in February, 1934, on a charge of robbery, when Factor went there and interviewed him. Costner was brought to Chicago, on the same train with Factor; he had been disappointed in a "deal" he supposedly had made with the Federal authorities in the mail robbery case, but understood that if he came to Chicago the Maryland authorities would not prosecute the case there, and he expected "consideration" likewise from the Cook County authorities. This "consideration" was given him; for, although he testified he participated in the alleged "kidnapping", he was never prosecuted for it. Costner is now in a Federal penitentiary for a crime committed in North Carolina, which at the time of petitioner's trial he comfortably supposed he had all fixed up between himself and the authorities.

We present a close tie-up of the important factors:

(a) Factor had to have a means of remaining in the United States—else face certain deportation and imprisonment for crime in England;

(b) The alleged "kidnapping" furnished Factor a delay in his extradition proceedings—which were never carried out;

(c) Factor owed the Capone "Syndicate" a favor for their effecting the return of his son in a prior "kidnapping"; and it may be assumed that the Capone "Syndicate" kidnapped Factor's son for some reason, since he was returned by them without payment of any ransom money;

(d) Factor and the Capone "Syndicate" were on special good terms, and Factor had contributed to the Capone Defense Fund to the amount of fifty thousand (\$50,000) dollars;

(e) Factor was a member of the Capone "Syndicate"; his partner Murray Humphries had paid an income tax on the fifty thousand (\$50,000) dollars ransom money he collected for the release of Mr. Fritchie of the Milk Wagon Drivers Union, in 1933;

(f) The Capone "Syndicate" and Roger Touhy were not on good terms, and they sought to take his business away from him;

(g) Factor, by getting petitioner out of the way, would be doing the Capone "Syndicate" a favor, he being 28 a member thereof, and which would stand him in good stead at a later date; and it may be assumed that the Capone "Syndicate" aided him in having his extradition warrant shelved;

(h) Factor kept open house, with a private bar, at a prominent hotel, prior to petitioner's trial, and soon ceased to be "Jake the Barber", and became "John Factor, wealthy speculator", or "John Factor, wealthy promoter." He succeeded in having the newspapers and radio forget mention of his infamous swindle of millions of dollars from Widows and Orphans of England. (*The Chicago Tribune*, Saturday, March 6, 1948, now classified him as: "John (Jake the Barber) Factor, Chicago racketeer";

(i) Factor played a great part in vilifying petitioner in the newspapers and radio, setting him up as a dangerous criminal, and the head of a "kidnapping gang";

(j) Costner was brought into the case on a pretext of testifying falsely against petitioner, so that he could be convicted—and in turn, Costner was to have received "consideration" for such testimony, in having other charges of crime dropped;

(k) Henrichsen no doubt was also promised "consideration", for testifying falsely against petitioner, since he was later employed by the same persons who sought his conviction, e. g., the State's Attorney's office and the Capone "Syndicate";

(l) Capt. Daniel Gilbert, head of the State's Attorney's police detail, within a few hours of the alleged "kidnapping", was quoted as saying that the "Roger Touhy gang" had done this, and was greatly instrumental in obtaining petitioner's conviction;

(m) On information and belief, petitioner has been advised, that William Scott Stewart was retained on a yearly basis by the Capone "Syndicate", subsequent to petitioner's conviction; and it may be assumed Mr. Stewart sought petitioner's conviction and affirmance on the appeal;

(n) On information and belief, petitioner states the fact to be, that the State's Attorney's office and the 29 Capone "Syndicate" worked hand in hand to convict

petitioner. In a recent hearing before the Civil Service Commission, evidence was presented, showing a tie-up between the State's Attorney's office and the Capone "Syndicate." (Re: the Connelly and Drury case, regarding the James Ragan affair of 1946); and,

(o) It is commonly known that the Capone "Syndicate" kidnapped James Lynch and collected two hundred thousand (\$200,000) dollars ransom money in 1932. Mr. Lynch was head of a racing news and associated with James Ragan, who was slain by the Capone "Syndicate" in 1946.

Newly Discovered Evidence.

Subsequent to his imprisonment, petitioner hired investigators, to delve into the allegation of Factor's "kidnapping", for the purpose of unearthing pertinent facts, which would tend to prove his innocence. Roger Touhy has now come into possession of the following important facts:

(a) The affidavits by disinterested persons, which are incorporated herein in haec verba, definitely disclose that Isaac Costner committed perjury, in testifying that he was an accomplice of the petitioner in the alleged "kidnapping", when in truth and in fact, Costner was in and around Knoxville, Tennessee, on June 30, 1933, the date of the alleged "kidnapping." (See *Exhibits "C" to "T"*);

(b) That John Factor, who testified at petitioner's trial, that he was "kidnapped", subsequently boasted to Attorney Thomas McConnell, of Chicago, Illinois, that he falsely identified petitioner as his "kidnapper"; and that he committed perjury against Roger Touhy at the trial. (See *Coram Nobis* petition No. 72, in the Criminal Court of Cook County, in the July 1946 Term.);

(c) That petitioner will, at a hearing in open Court, prove through oral testimony of Mr. Thomas McConnell, a member of the bar of high standing, to whom the boasting declaration was made by John Factor, of said identification, fraud and perjury;

(d) That the signers of the attached affidavits, regarding Costner's whereabouts in and around Knoxville, Tennessee, at the time of the alleged "kidnapping", will be subpoenaed into open Court to give oral testimony thereto;

(e) That other and important witnesses will be subpoenaed into open Court to testify in petitioner's behalf—but that he cannot at this time disclose their names, for fear that they may be intimidated by the prosecuting authorities into not testifying, or into leaving town at the time of the hearing of said cause; and,

(f) That petitioner will introduce as testimony and evidence, "wire recordings" of conversations with certain persons connected with his trial, disclosing the fraud perpetrated upon petitioner in obtaining his conviction for the alleged Factor "kidnapping."

31

I.

Contentions.

Petitioner's Conviction Was Obtained in Violation of the "Due Process" Clause of the Fourteenth Amendment to the United States Constitution, by the Trial Judge Forcing Counsel to Appear for Petitioner, Against Said Counsel's and Petitioner's Express Desire: Denial of Counsel of Petitioner's Own Choice: Denial of a Change of Venue: Denial of Time and Opportunity to Prepare a Defense: Through Perjured Testimony; Fraud: and Suppression of Evidence.

(a) Denial of Counsel of Petitioner's Own Choice:

Under both our Federal and State Constitutions, a defendant has the right to defend in person and by counsel of his own choosing. That right, based as it is on a fundamental principle of justice, must be protected by the trial judge. *Glasser v. United States*, 315 U. S. 60. This fundamental right is denied to a defendant unless he receives a reasonable time and a fair opportunity to secure counsel of his own choice. Sixth Amendment to the United States Constitution; Article II, Section 9, of the Illinois Constitution; *Powell v. Alabama*, 287 U. S. 45; *Johnson v. Zerbst*, 304 U. S. 308; *People v. McLaughlin*, (N. Y.) 53 N. E. 2d 357.

Section 9 of Article II, of the Illinois Constitution provides:

"In all original prosecutions the accused shall have the right to appear in person and by counsel."

There does not appear in said Constitution any mandatory requirement that counsel be assigned to a defendant in a criminal prosecution, except in capital cases, and then only, if a defendant places himself under oath as being unable to employ counsel.

In order to obtain counsel in a criminal case, a defendant must comply with the provisions of the statute, which reads:

"Every person charged with crime shall be allowed counsel, and when he shall state upon oath that he is unable to procure counsel, the court shall assign him competent counsel, who shall conduct his defense."

Chap. 38, Sec. 730, Ill. Rev. Stat. 1947.

In the instant case, petitioner did not place himself under oath as being unable to procure counsel, and
32 therefore, did not come within the provisions of the statute. Roger Touhy was in a position to employ counsel and desired to do so—only the trial judge deprived him of that right, by holding that Mr. Stewart was to act as his counsel, or face a jail term. A most unusual situation indeed! See Mr. Stewart's affidavit, filed in the court. (Exhibit "B".)

In substituting other counsel for the public defender, the statute provides in part as follows:

"The Court may, *with the consent of the defendant*, appoint counsel, other than the public defender, and shall so appoint *if the defendant shall so demand* * * *"

Chap. 34, Sec. 163f, Ill. Rev. Stat. 1947. (Emphasis supplied.)

Judge Feinberg did not appoint Mr. Stewart as counsel "*with the consent of the petitioner.*" Judge Feinberg acted without power or authority in appointing Any Counsel, and certainly had no right to compel Mr. Stewart to serve as Roger Touhy's counsel—especially since neither Mr. Stewart nor petitioner desired it—and exerted every possible legal means of avoiding it. Just as the services of an attorney appointed by the court may not be forced upon a pauper defendant, (*Schuble v. Youngblood*, 73 N. E. 2d 478) neither can counsel be forced upon one who is financially able and willing to employ his own counsel.

Mr. Stewart's appointment placed him in the category of a public defender, making the circumstances similar to

those in *People v. Schiffman*, where it was held at 350 Ill. 243:

"The appointment of a public defender in this case was not justified. The law does not contemplate the appointment by the court of counsel for a defendant charged with crime unless he is unable to procure counsel for himself. He must do so if he is able. Not only that, he has the right to be represented by counsel of his own choice."

The Illinois Supreme Court has oftentimes ruled on this question, and holds the rule to be:

"Under the statutory provision (Ill. Rev. Stat. 1943, chap. 38, par. 730), the court is required to provide counsel for defendant *only when he shall state on oath he is unable to procure counsel.*" *People v. Fuhs*, 390 Ill. 67. (Emphasis supplied.)

33 Just as the right to counsel of one's own choice is held to be the law of the State of Illinois, so the Federal Courts also hold, and it was aptly stated:

"The accused in a criminal action has a constitutional right to have assistance of counsel for his defense, which includes the right of accused to *counsel of his own choosing*, and denial of such right constitutes a denial of due process of law."

United States v. Bergamo, 154 F. 2d 31.

(Emphasis supplied.)

Recorded cases are replete with accusations by persons, that counsel was not appointed to represent them; that they did not waive such right; or that they were not advised they could have counsel appointed for them gratis. The *Schiffman* case, *supra*, holds that counsel was appointed by the court without authority. Yet, we can find no reported case wherein the trial judge compelled an attorney to represent a defendant against counsel's and defendant's express desires,—and threaten counsel with imprisonment for a failure to accept such appointment, especially, where the defendant was able and willing to employ other counsel—one of his own choice.

There must have been a very good reason for Judge Feinberg to have insisted that Mr. Stewart act as petitioner's counsel. Petitioner contends that the trial judge certainly did not have his welfare in mind by such appointment. Needless to state, it was contrary to established law,

both State and Federal. It is at all possible that an understanding existed between Mr. Stewart, Judge Feinberg, and the State's Attorney's office in such appointment, since Mr. Stewart knew that the trial judge could not legally force him to accept the court-appointment.

(b) *Denial of a Change of Venue:*

The trial court unlawfully denied petitioner a change of venue, albeit the petitioner and his court-appointed counsel, Mr. Stewart, complied with the statute, alleging prejudice on the part of the judge. (Chap. 146, Sec. 18, Ill. 34 Rev. Stat. 1947.) Such a denial deprived petitioner of "Due Process of Law", in violation of the Fourteenth Amendment to the United States Constitution, and Article II, Section 9, of the Illinois Constitution.

In *People v. Shiffman*, 350 Ill. 243, it was held:

"The right to a change of venue from a judge in a criminal case on compliance with the statute is *absolute*. *People v. Cohen*, 268 Ill. 416, 109 N. E. 259; *Cantwell v. People*, 138 Ill. 602, 28 N. E. 964; *People v. Rosenbaum*, 299 Ill. 93, 132 N. E. 433. It is not for the judge to determine whether or not he entertains prejudice against the defendant. In a criminal case, when a defendant in apt time brings himself within the terms of the statute, the trial judge has no discretion as to whether or not a change of venue will be granted. *He must allow it as a matter of right*. He cannot question the truthfulness of the good faith of the charge of prejudice. When the statute has been complied with, the trial judge loses all power and authority over the case except to make the necessary order to effectuate a change of venue. *Cantwell v. People, supra*."

Not only in this the law in the State of Illinois, but the same applies in the neighboring State of Indiana, wherein it is held:

"It is well settled that when an affidavit for change of judge is filed in a proper case, based on the bias and prejudice of the judge, the court has no discretion in the matter. In examining and granting or refusing to grant such change in a cause where a change is permitted by law, the judge acts in a ministerial way, and if the affidavit is sufficient, *the change must be granted*. (Citing cases.)"

State ex rel. Ballard v. Jefferson Circuit Court, 73 N. E. 2d 489.

(c) *Denial of Time and Opportunity to Prepare for Trial:*

Petitioner has set forth herein, that his first trial in the Factor case ended in a mistrial, since Judge Feinberg discharged the jury, after being out for twenty-five hours, standing ten to two for acquittal. A second trial was ordered to commence within ten days.

Mr. Stewart, in his affidavit to the Court, (*Exhibit "B"*), urged that he be allowed further time to prepare petitioner's defense, setting forth that he wished to investigate certain state witnesses, among them being Isaac Costner. (This is the "surprise" witness, which was brought in on the fourth day of the trial. Judge Feinberg denied such motion. The petitioner was rushed to trial with such expediency and haste, that his counsel did not have the time and opportunity of preparing a proper defense.

Under the Sixth Amendment to the United States Constitution, as well as Article II, Section 9, of the Illinois Constitution, a defendant is entitled to have the assistance of counsel, which includes the right to reasonable time and opportunity of preparing a defense. The trial of a person charged with felony, especially one that is capital, is not an informal matter that should be rushed to an immediate conclusion. (Kidnapping for Ransom, Chap. 38, Sec. 386, Ill. Rev. Stat. 1947, is a capital offense—and the death penalty was being sought against petitioner.) The trial should be in accordance with the recognized rules of law and procedure, and to be represented by counsel is not an idle ceremony, but a substantial part of the law of the land, guaranteed by the Constitution. *People v. Nitti*, 312 Ill. 73; *People v. Gardiner*, 303 Ill. 204; *People v. Hoffman*, 379 Ill. 318. In the latter case it was held:

"* * * Delusive interests of haste should not be permitted to obscure substantial requirement of orderly procedure."

In the *Shiffman* case, *supra*, the Court reversed, holding:

"Whether guilty or innocent, defendant was entitled to a fair trial. One of the recognized essentials of such a trial is a reasonable opportunity for the defendant to acquaint his attorney with the nature of his defense. Another is a reasonable opportunity for the attorney to prepare for the trial. *People v. Bopp*, 279 Ill. 184, 116 N. E. 679. Neither of these opportunities were afforded the defendant." (Emphasis supplied.)

In every criminal case a defendant is entitled under the law, to a reasonable time and full opportunity of preparing for trial, and that right should always be guaranteed to him. *People v. Conley*, 80 Ill. 236; *Dacey v. People*, 116 Ill. 555; *Price v. People*, 131 Ill. 223. Yet, the Supreme Court of Illinois, in reviewing petitioner's writ of error proceedings, did not adhere to its own previous holdings.

In the Hamm trial, sufficient time was allowed petitioner's counsel to fully prepare his defense, and upon investigation, his counsel was able to uncover that the Government's star witness, Walter Bowick, committed perjury, by stating he was in St. Paul, Minnesota, at the time of the Hamm kidnapping, when in truth and in fact he was in Chicago, Illinois. Petitioner's acquittal soon followed.

Petitioner's court-appointed counsel, Mr. Stewart, was denied the time and opportunity of investigating the State's witness, one Isaac Costner, since Judge Feinberg forced the trial to commence within ten (10) days of the first trial. Had the court allowed petitioner the time and opportunity of fully preparing his defense, as is required by law, his counsel would have checked up on Costner, and it would have been disclosed that Costner was a liar and perjurer, and was not in Chicago, Illinois, at or during the time of the alleged "kidnapping." No doubt the prosecuting authorities used their influence with Judge Feinberg in forcing the trial to begin at an early date, knowing full well that delay would disclose Costner's perjured testimony. The affidavits, attached hereto, were obtained after the review by the Illinois Supreme Court, and too late to do the petitioner any good on the writ of error proceedings.

This case may be likened to *Powell v. Alabama*, 287 U. S. 45; wherein the United States Supreme Court stated:

"It is not enough that counsel thus precipitated into the case though there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts. No attempt was made to investigate. *No opportunity to do so was given.* Defendant was immediately hurried to trial." (Emphasis supplied.)

In the *Powell* case, *supra*, the Court there said, it was the duty of the Court in charge to see that they were denied

no necessary incident to a fair trial, and in reversing the case the Court said that the duty to assign counsel:

37 "Is not discharged by an assignment of counsel at such time or under such circumstances as to preclude the giving of and effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate, already adverted to, 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.'"

In *Avery v. Alabama*, 308 U. S. 444, the Court, in stronger language than in the *Powell* case, *supra*, said:

"Denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The constitution's guaranty of assistance of counsel cannot be satisfied by mere formal appointment."

The same principle is adhered to in *Brown v. Mississippi*, 297 U. S. 278; *Beckett v. Hudspeth*, 131 F. 2d 195; *Ex parte Kramer*, 122 P. 2d 862; *Jones v. Kentucky*, 97 F. 2d 335; *People v. McLaughlin*, 53 N. E. 2d 357; *Amrine v. Times*, 131 F. 2d 827; *Wilcoxon v. Aldredge*, 15 S. E. 2d 873.

It is the recognized principle of law, both under the State and Federal Constitutions, that a defendant not only must be represented by "counsel of his own choice", but that his counsel must have "reasonable opportunity to prepare a proper defense." Roger Touhy was not given "counsel of his own choice", nor was his court-appointed counsel given "sufficient time and opportunity of preparing his defense"—in spite of the fact he requested a continuance therefor.

Under such unorthodox proceedings, was the petitioner rushed to trial, and it was not a "real" trial, but a "sham", one of false pretense and fraud. *Ex parte Sharp*, 33 F. Supp. 464. "Due Process of Law", under the Fourteenth Amendment, requires that condemnation shall be rendered only after trial, and that the "hearing" must be a real one and not a sham or pretense. *Palko v. Connecticut*, 302 U. S. 319.

The court-appointment of counsel, who did not desire

such appointment, and against counsel's and petitioner's express wishes; the denial of a change of venue; and the denial of time and opportunity of preparing a proper defense, contravened the petitioner's inherent rights of the "Due Process clause of the Fourteenth Amendment, which render his conviction null and void, must be regarded as a basis for discharge on habeas corpus proceedings, in view of the fact that all other remedies are no longer available to the petitioner. *Marino v. Ragen*, 68 S. Ct. 240.

(d) *Perjured Testimony:*

John Factor committed perjury, by stating under oath, that he identified petitioner as his "kidnapper", while in truth and in fact, he subsequently boasted to Attorney Thomas McConnell, Chicago, Illinois, that he committed perjury, and that his testimony was false;

Isaac Costner committed perjury, by stating under oath, that he participated with Roger Touhy in the alleged Factor "kidnapping", while in truth and in fact, he was in and around Knoxville, Tennessee, during the time of the alleged "kidnapping";

A. L. Epstein committed perjury, by stating under oath, that at the time of the alleged "kidnapping", he gave the police a description of the two men he saw, and that he could identify them if he ever saw them again; and later testified that Roger Touhy was not one of those men. After taking a brief intermission in the Judge's chambers, Epstein returned and gave perjured testimony, stating he could not now identify anyone;

Other State witnesses committed perjury, which was of a minor nature, yet all of which aided the State in obtaining petitioner's illegal and unjust conviction.

Roger Touhy's conviction was secured by the use of perjured testimony, which forms the basis for the contention that he was deprived of "Due Process of Law." *Lesser v. New York*, 117 F. 2d 30; *Mooney v. Holohan*, 294 U. S. 103; *Pyle v. Kansas*, 317 U. S. 213; *Brown v. Mississippi*, 297 U. S. 278; *Whitman v. Wilson*, 318 U. S. 688. In *Hysler v. Florida*, 315 U. S. 411, the United States Supreme Court stated:

"If a state, whether by the active conduct or the connivance of the prosecution, obtains a conviction through the use of perjured testimony, it violates civil-

ized standards for the trial of guilt or innocence and thereby deprives an accused of liberty without due process of law."

Factor's perjured testimony came to light when he boasted to Attorney Thomas McConnell; much too late to have been brought to the trial court's attention in seeking a new trial, or in vacating the judgment of conviction.

Factor is a liar, perjurer, and a swindler on a gigantic scale. He committed perjury in open Court by testifying that he was "kidnapped" by petitioner. He swore upon oath that he was born in England. He swore upon oath that he was born in Chicago, Illinois, in applying for a marriage license. The truth is, Factor was born in Russia. Factor can not be believed under oath!

There is no doubt, the record sustains it, and it must be conceded, that petitioner was convicted largely upon the testimony of Costner. He gave perjured testimony, so that he would not be prosecuted for a Federal charge of mail robbery. "Consideration" was given Costner in the Factor case, though not in the Federal matter. The State could hardly place Costner on trial for "Kidnapping" Factor, since they evidently knew he was as innocent as petitioner in that alleged "kidnapping", and had they tried to convict Costner, no doubt he would have denied the whole matter—disclosing the fraud and perjury—and Roger Touhy would have been found Not Guilty.

The record, as to Costner's cross-examination, discloses:

Q. When you were in Baltimore you were accused of the North Carolina mail robbery, weren't you?

A. Yes, sir.

Q. And what else?

A. Well, I was accused of a robbery there in Baltimore. . . .

Q. When the authorities there asked you if you knew anything about the kidnapping of Factor, what was your first answer?

A. I told them no.

Q. You denied it at first, is that right?

A. That is right. I never admitted to the authorities in Baltimore that I knew anything about the Factor case.

Q. Then Mr. Factor came down there; that is right, isn't it?

A. Yes, sir. . . .

Mr. Stewart: And now here, what is your position here? You are expecting something for your testimony aren't you?

The Witness: Yes.

40 Q. Well, what have the people in authority said on that subject? You have had a little experience. What did you ask for?

A. I have had some experience, and I had what I thought was a fair trade made in the Federal Court where I could get out of the case without going to the penitentiary and I went to the penitentiary.

Q. But haven't you asked Mr. Crowley what you are going to get for your testimony?

A. The prosecuting attorney, Crowley, told me I would get some consideration.

Q. And you are just doing the best you can for yourself is that it?

A. That is the truth." (Abst. 112.)

Here we have uncontested proof of an alleged "fair trade" made by the prosecuting attorney with Costner, for his false and perjured testimony against petitioner, and which came to petitioner's attention long after trial and conviction. As already shown, Costner was given "consideration."

Costner, a convicted criminal, committed perjury in open Court against petitioner, and should never have been believed under oath, especially since he first denied, then later admitted participation in the alleged "kidnapping"; having had experience in bargaining for his testimony; that he was receiving "consideration"; and that he thought he had made a "fair trade."

An interesting situation existed at petitioner's trial. Costner corroborated Factor, and in turn Factor corroborated Costner; thus both were set up as reliable witnesses! We now have proof positive, that both Costner and Factor committed perjury against petitioner. Attorney Thomas McConnell and the signers of the attached affidavits will testify in open Court to such perjury against petitioner.

Hendrichsen, also a State witness, committed perjury, and in all probability was promised "consideration" for his testimony. He later went to work for the State's Attorney's office, and subsequently, was employed by the Capone "Syndicate."

It may be presumed, that Factor also made a "deal" with

the prosecuting authorities for his perjured testimony. Roger Touhy's right to his liberty and freedom was bargained away by Factor for his own extradition warrant 41 to England to be shelved. John Factor not only was capable of "railroading" an innocent man to prison, but continued to practice his swindling again in the United States, and pleaded Guilty to mail fraud in the Federal District Court at Des Moines, Iowa, being now confined for said crime.

While petitioner does not expressly aver that the State's Attorney's office suborned such perjured testimony, yet, it must be recognized that they knew the very reputation and character of the witnesses for the prosecution, and that at least one or more "deals" were made by them. The conclusions must be drawn in favor of petitioner's assertions.

An almost identical situation arose in *Rooney v. Ragen*, 158 F. 2d 346, and the Circuit Court of Appeals for the Seventh Circuit held that the writ of habeas corpus should issue, a hearing to be granted on the allegations of denial of "Due Process."

(e) *Fraud:*

Petitioner contends that his trial was not a "real" trial, but a sham, one of false pretenses, perjury, fraud, and suppression of evidence. *Ex parte Sharp*, 33 F. Supp. 464, and only a means of depriving him of his freedom and liberty. A fraud was perpetrated upon the trial court, the jury, and the petitioner, by Factor's perjured testimony, stating that he recognized Roger Touhy as one of his "kidnappers", when in truth and in fact, he later boasted to Attorney Thomas McConnell, that he lied; and this confession will be proved in Court by testimony of a member of the bar of high standing, to whom the boasting declaration was made. That the present conviction against Roger Touhy cannot stand, with Factor's testimony out, is clear from Factor's own statement in a petition to the Supreme Court of the United States, wherein it was stated under oath:

"The testimony of your petitioner (John Factor) against said Touhy resulted in the conviction of Touhy in the Criminal Court of Cook County, Illinois, for the kidnapping of your petitioner, by reason of which said Touhy was sentenced to the equivalent of a life sentence in the Illinois State Penitentiary."

42 An affidavit filed by the State's Attorney on the trial, that "John Factor is an indispensable witness to the State's case against the defendants (including Roger Touhy)", is further proof of Factor's perjury and fraud against petitioner.

In a recent petition for habeas corpus in the United States District Court at Detroit, Michigan, John Factor again alleged that he was responsible for petitioner's conviction. This petition being identical with a prior one, the Court denied it.

Costner gave perjured testimony, stating that he participated in the alleged "kidnapping" with the petitioner, when it now turns out that he was in and around Knoxville, Tennessee, during such time.

Epstein gave perjured testimony, stating that he could identify the men who "kidnapped" Factor, then after a brief session with petitioner's counsel, the trial judge, and the prosecuting attorney, in the judge's chambers, returned to the stand and gave a complete different story, which was false and perjured.

In *Palko v. Connecticut*, 302 U. S. 319, it was said:

"'Due Process of Law', under this clause (Fourteenth Amendment), requires that condemnation shall be rendered only after trial, and that the hearing must be a real one, and not a sham or pretense."

Certainly, no person can say that Roger Touhy had a "fair trial." It is safe to assume that the prosecuting authorities made a "deal" with Costner and also with Factor. Costner was never placed on trial for the alleged Factor "kidnapping", and Factor was never extradited to England. The two are much intertwined to believe otherwise.

Petitioner is now in possession of positive proof, that both Costner and Factor gave perjured testimony. Thus, petitioner's allegations, taken together, when liberally construed in his favor, as they must be, substantially allege knowledge of, or in the words of the United States Supreme Court in *Hysler v. Florida*, *supra*, "active conduct or connivance" on the part of the prosecution.

It is urged that absolute proof of knowledge by the prosecuting authorities of the perjury beyond all peradventure of doubt is not required. Even in a case where the
43 perjury was unknown by the prosecuting authorities until some time after the trial, a federal court had de-

terminated that the conviction was in violation of the Fourteenth Amendment and released the petitioner upon habeas corpus. In *Jones v. Kentucky*, 97 F. 2d 335, (C. C. A. 6th) it was held:

"The concept of due process as it has become crystallized in the public mind and by judicial pronouncement, is formulated in *Mooney v. Holohan*, 294 U. S. 103. Its requirement in safe-guarding the liberty of the citizen against deprivation through the action of the State embodies those 'fundamental conceptions of justice which lie at the base of our civil and political institutions', referred to in *Hebert v. Louisiana*, 272 U. S. 312. This requirement cannot be satisfied 'by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.' If it be urged that the concept thus formulated but condemns convictions obtained by the state through testimony known by the prosecuting officers to have been perjured, then the answer must be that the delineated requirement of due process in the *Mooney case* embraces no more than the facts of that case require, and that the 'fundamental conceptions of justice which lie at the base of our civil and political institutions' must be with equal abhorrence condemned as a travesty a conviction upon perjured testimony if later, but fortunately not too late, the falseness is discovered, and that the state in the one case as in the other is required to afford a corrective judicial process to remedy the alleged wrong, if constitutional rights are not to be impaired."

Roger Touhy's contentions today are the same as in 1934, before and during the trial. He advances no new theory, but adheres rigidly to the truth, that he had no part in the alleged Factor "kidnapping", and that he is innocent!

(f) *Suppression of Evidence:*

Petitioner also wishes to call the court's attention to the fact that Father Weber, who testified for petitioner in the

first trial, was ordered by his superiors to refrain from testifying in the second trial, or he would be severely punished. This can mean only one thing, and that is, that the prosecuting authorities must have persuaded Father

Weber's superiors to acquiesce to their demands, there-
44 by causing truthful evidence to be suppressed. So too,

with suppressing the evidence of Thomas Meehan, by threatening him bodily harm. Also the prosecuting authorities suppressing the evidence of petitioner's innocence of crime in the alleged Factor "kidnapping", when they knew or had reason to know, that he had no part in such affair—if one did exist. The State, through its prosecuting authorities, also suppressed the evidence of petitioner's true past life, by characterizing him as a dangerous criminal, and the head of a "kidnapping gang." A few of such matters existed, but we name only those herein named, else it would unduly extend this petition. Such suppression of evidence, by the prosecution, *Hurd v. People*, 25 Mich. 406; *Weller v. People*, 39 Mich. 16; is also the action of the State itself, *Ex parte Virginia*, 100 U. S. 339; and the perjured testimony, was a denial of "Due Process of Law." *Mooney v. Holohan*, 294 U. S. 103; *Brown v. Mississippi*, 297 U. S. 278.

The combination of facts and circumstances under which petitioner was adjudged guilty and sentenced, did such violence to the 'fundamental principles of liberty and justice, which right is at the base of all our civil and political institutions', *Hebert v. Louisiana*, 272 U. S. 312, as to contravene the provisions of the "Due Process" clause of the United States Constitution's Fourteenth Amendment. Such a conviction should not be suffered to stand!

Conclusion.

At a hearing of this cause, petitioner will produce witnesses who will subject themselves to examination *ore tenus* and will testify to the truth of the allegations made herein. When petitioner's averments are proven true, he will then be entitled to his discharge, on the ground that he was denied counsel of his own choice; a change of venue; time and opportunity of preparing a proper defense; was convicted through perjury; fraud, and the suppression of evidence;—which are denials of constitutional rights, rendering his commitment void. *Smith v. O'Grady*, 312 U. S. 329.

45 It is of no significance whether the infringement of a Constitutional Right occurred before, during or after the trial. The redress of violation of Constitutional Rights cannot depend upon the timing of the invasion. The acts of police officers; prosecuting authorities; and others, *Smith v. O'Grady*, 312 U. S. 329; *Mooney v. Holohan*, 294 U. S. 103; *Johnson v. Zerbst*, 304 U. S. 458; *Hysler v. Florida*, 315 U. S. 411; may constitute invasions of constitutional rights which render the judgment of commitment subject to successful attack in habeas corpus proceedings.

Habeas Corpus is a recognized remedy for one held in prison in violation of a right guaranteed by the Federal Constitution. *Smith v. O'Grady*, 312 U. S. 329; *In re Jarvis*, 66 Kan. 329; *Cochran v. Kansas*, 316 U. S. 255; *House v. Mayo*, 324 U. S. 42; *Waley v. Johnson*, 316 U. S. 101; *Johnson v. Zerbst*, 304 U. S. 458; *Mooney v. Holohan*, 294 U. S. 103; *Powell v. Alabama*, 287 U. S. 45; *Hall v. Ragen*, 60 F. Supp. 820; *Marino v. Ragen*, 68 S. Ct. 240.

The law is established, that habeas corpus lies in a case where the conviction has been in disregard of the Constitutional Right of the accused and where the writ is the sole effective means of preserving his rights. *Waley v. Johnson*, 316 U. S. 101; *House v. Mayo*, 324 U. S. 42; *Voight v. Webb*, 47 F. Supp. 743; *Powell v. Alabama*, 287 U. S. 45; *Brown v. Mississippi*, 297 U. S. 278; *Mooney v. Holohan*, 294 U. S. 103; *Hall v. Ragen*, 60 F. Supp. 820; *Marino v. Ragen*, 68 S. Ct. 240.

The question whether there has been a violation of the "Due Process" clause of the Fourteenth Amendment is one on which this Court 'must make an independent determination on the undisputed facts.' *Malinski v. New York*, 324 U. S. 401.

II.

Roger Touhy Convicted For His Escape.

Subsequent to petitioners illegal and unjust conviction and detention, he sought various remedies in the courts for
46 relief, and was denied each time. The unjustness of his loss of liberty for an alleged crime which he did not commit, rankled so much that petitioner lived only for the day that he could prove his innocence, and that he was indeed "railroaded" into prison. Petitioner took a most

unorthodox and unwise measure, escaping from confinement on October 9, 1942.

Petitioner fully realized that such action was unwise, yet, it must be remembered, *there was an unjust conviction*, and there are certain mitigating circumstances in his favor, and they are:

After petitioner's conviction, he spent a great deal of money in hiring investigators to find proof of his innocence. He also paid various attorneys to bring legal actions in the court, all without avail. Petitioner left a wife and two young sons, who had to live off of what money remained. He felt himself a lost soul, doomed to spend the remainder of his life in prison. The first rights and thoughts of a human being are: "self-preservation." This cannot be denied. Especially is this true, where one is illegally and unjustly convicted.

Two months after petitioner's escape, Judge John P. Barnes, of the United States District Court of Chicago, ordered a long standing rule of the Illinois prisons' to be abolished, permitting inmates to file petitions *pro se*. (*United States, ex rel. Bongiorno v. Ragen*, 54 F. Supp. 973.) However, up until this time, petitioner could not seek relief *pro se* in other courts, since he was practically without the financial aid to do so. These facts are called to the Court's attention in the extenuating circumstances prevailing at the time of petitioner's escape from prison.

Shortly after petitioner's escape from prison, he was returned, having had his freedom from October 9, 1942, until December 31, 1942. While out of prison, petitioner did not commit any crime whatsoever.

Petitioner was indicted by the Circuit Court of Will
47 County, State of Illinois, under Cause No. 9604, for
"Aiding Escape", and on November 30, 1943, was sentenced to a term of One hundred ninety-nine (199) years' imprisonment. (*Exhibit "U".*)

Contentions.

Petitioner contends that since his original imprisonment was unlawful, his subsequent conviction is based on a nullity and cannot stand; and that the subsequent conviction and sentence are void, having been entered contrary to the law of the State of Illinois.

The statute, under which petitioner was convicted is set forth as follows:

"Aiding escape. Section 82. Whoever conveys into the penitentiary, or into any jail or other place of confinement, and disguise, instrument, tool, weapon or other thing adapted, or useful to aid a prisoner in making his escape, with intent to facilitate the escape of *any prisoner there lawfully committed or detained*, or by any means whatever aids, abets, or assists such prisoner to escape or an attempt to escape from any jail, prison or any lawful detention whether such escape is effective or attempted or not, or conceals or assists any convict after he had escaped, shall upon conviction thereof be given the same penalty as the prisoner who he aided or abetted, except that in case the prisoner is sentenced to death, the penalty for such aid shall be imprisonment for life in the penitentiary." Chap. 38, Sec. 228, Ill. Rev. Stat. 1947. (Emphasis supplied.)

Under Point I, we have set forth that Roger Touhy was "illegally committed and detained" in prison for the alleged Factor "kidnapping." This is so, especially since his conviction was based on Perjury; Fraud; and Suppression of Evidence, which violates the very principles of "Due Process" under the State and Federal Constitutions.

Furthermore, Section 92 (Aiding Escape) provides that a person, *not a prisoner*, aiding, abetting or assisting a prisoner to escape, shall be so punished. Petitioner was a prisoner within the Illinois State Penitentiary, under commitment in Cause No. 71236, issued out of the Criminal Court of Cook County, when he was charged in the Circuit Court of Will County, with aiding another prisoner to escape. (Petitioner strongly resists any assumption that he aided another prisoner to escape—even though he personally did escape.)

Petitioner was charged with aiding one Edward Darlak to escape. The brother of Edward Darlak, one Cassimer Darlak, was instrumental in conveying into the penitentiary several weapons to aid his brother in escaping. Petitioner did not know Cassimer Darlak. He did not have any dealings with him, nor did he have any part in the bringing into the penitentiary such weapons. Edward Darlak was not tried or convicted for his escape—no doubt because of his present sentence of One hundred ninety-nine (199) years. Cassimer Darlak was convicted and sentenced to a term of 1 to 20 years' imprisonment, having lately been released from such confinement, on parole.

The subsequent conviction of the petitioner could not have occurred without the illegal prior conviction. They are intertwined with each other.

Another reason why petitioners' sentence for "Aiding Escape" is illegal and cannot stand, is that the law of the State of Illinois provides, that where one is already imprisoned—any crime committed thereafter, must be punished by consecutive punishment—and not one which runs concurrently with the original sentence. Petitioner's subsequent sentence was entered in a concurrent nature!

The rule is, that in the absence of a judgment of conviction stating that it is to run consecutively to another sentence, it must run concurrently with another one. *People v. Whitson*, 74 Ill. 20; *Chasteen v. Denmark* 138 F. 2d 289; *United States v. Patterson*, 29 F. 775; *Hode v. Sanford*, 101 F. 2d 20; *Boyd v. Archer*, 42 F. 2d 43. The form of imprisonment in such type of case is not authorized by law, and therefore void in its entirety.

The provisions of the statute, for "crimes committed in the penitentiary", are in part as follows:

49 "When any crime is committed within any division or part of the penitentiary system of any person confined therein, cognizance thereof shall be taken by any court of the county wherein such division or part is situated having jurisdiction over the particular class of offenses to which such crime belongs. Such court shall try and punish the person charged with such crime in the same manner and subject to the same rules and limitations as are now established by law in relation to other persons charged with crime in such county. But in case of conviction, the sentence of said convict shall not commence to run until the

expiration of the sentence under which he is then held in confinement in the penitentiary system. . . .
 Chap. 108, Sec. 118, Ill. Rev. Stat. 1947. (Emphasis supplied.)

The Circuit Court of Will County has long since lost jurisdiction of petitioner, since more than thirty days has expired from rendition of judgment, and imprisonment in the penitentiary. *People v. Leinecke*, 290 Ill. 560. The sentence and judgment cannot be corrected or vacated and set aside by that court. Since the Circuit Court of Will County had no jurisdiction to enter a concurrent sentence, habeas corpus is a proper remedy to attack an absolutely void judgment. *Ex parte Hudging*, 249 U. S. 378; *Rowen v. Johnston*, 306 U. S. 19.

When the conviction and judgment in cause No. 71236, for the alleged Factor "kindapping" falls, by reason of a lack of "Due Process", the sentence and judgment in cause No. 9604, must also fall, since it is bottomed on that conviction.

In order for petitioner to be afforded "Due Process", under the Fourteenth Amendment to the United States Constitution, this Court must discharge petitioner not only on Mittimus No. 71236, but also on Mittimus No. 9604.

Prayer.

Wherefore, the petitioner herein, Roger Touhy, motions this Honorable Court to issue the Writ of Habeas Corpus forthwith; require respondent's counsel to file his written return hereto, and forward a copy of same to petitioner; and that petitioner may have a reasonable length of time to respond thereto; and that upon issue being joined and a hearing thereof, wherein petitioner may be personally
 50 present in open Court, that he may by oral testimony prove his innocence of the alleged Factor "kidnapping", and when so proven, that he may be ordered discharged out of further custody, under Mittimus No. 71236 and Mittimus No. 9604, in order that law and justice may prevail.

Respectfully submitted,

Roger Touhy,
 Petitioner.

Attorney for Petitioner.

51 State of Illinois, } ss.
County of Will. }

Roger Touhy, the petitioner herein, having been first duly sworn, on oath deposes and states that he has read the foregoing petition for the writ of habeas corpus by him subscribed; that he knows the contents thereof; and that the same is true in substance and in fact, except as to the matters and things therein stated to be upon information and belief, and as to those matters he believes them to be true.

Roger Touhy,
Petitioner.

Subscribed and sworn to before me, a Notary Public, this 26 day of March, A. D. 1948.

John J. Broderick,
Notary Public.

(Seal)

My commission expires: Dec. 17, 1950.

UNITED STATES OF AMERICA.

State of Illinois, }
 County of Cook. } ss.

Pleas before a branch of the Criminal Court of Cook County in said County and State, at a term thereof begun and held at the Criminal Court House, in the City of Chicago, in said County, on the first Monday (being the Fifth day) of February in the year of our Lord one thousand nine hundred and thirty-four and of the Independence of the United States the one hundred and fifty-eighth.

Present:

Honorable Michael Feinberg, Judge of the Circuit Court of Cook County and ex-officio Judge of the Criminal Court of Cook County.

Thomas J. Courtney, State's Attorney.

William D. Meyering, Sheriff of Cook County.

Attest:

George Seif,
 Clerk.

Be It Remembered, to-wit: On the twenty-fourth day of February in the year last aforesaid, it being the term of court aforesaid, the following among other proceedings, were had and entered of record in said Court, which said proceedings are in the words and figures following, to-wit:

The People of the State of Illinois, No. 71236.	vs.	} Indictment for Kid- napping for Ran- som.
Roger Touhy otherwise called	}	
Roger Touhy (Impleaded).		

This day come the said people, by Thomas J. Courtney, State's Attorney, and the said Defendant as well in his own proper person as by his Counsel also comes, and now neither the said defendant nor his Counsel for him saying anything further why the judgment of the Court should not now be pronounced against him on the Verdict of Guilty, heretofore rendered to the indictment in this cause.

Therefore, it is considered, ordered and adjudged by the Court that the said Defendant Roger Touhy is guilty of the said crime of Kidnapping for Ransom in manner and form as charged in the Indictment in this cause, and the said Verdict of guilty, and that he be and is hereby sentenced to confinement at hard labor in the Illinois State Penitentiary for the said crime of Kidnapping for Ransom in manner and form as charged in the indictment whereof he stands convicted and adjudged guilty for a term of Ninety-nine (99) years from and after delivery of the body of said defendant Roger Touhy to the Illinois State Penitentiary, and that the said defendant Roger Touhy be taken from the bar of the Court to the common jail of Cook County, from whence he came and from thence by the Sheriff of Cook County to the Department of Public Safety and the said Department of Public Welfare is hereby required and commanded to take the body of the said defendant Roger Touhy and confine him in said Penitentiary, in safe and secure custody for and during the term of Ninety-nine (99) years from and after delivery thereof, and that he be thereafter discharged.

It Is Further Ordered that the said Defendant pay all the costs of these proceedings and that execution issue therefore.

State of Illinois, }
County of Cook. } ss.

I, George Seif, Clerk of the Criminal Court of Cook County, in said county and state, do hereby certify the above and foregoing to be a true, perfect and complete copy of an order entered of record in said Court, in the case of the People of the State of Illinois, versus Roger Touhy, alias.

Witness, George Seif, Clerk of said Court and the Seal thereof, at Chicago, this twenty-fourth day of February, A. D. 1934.

(Signed) George Seif,

(Seal)

Clerk.

To the Sheriff of Cook County to Execute.

State of Illinois, }
 County of Cook. } ss.

AFFIDAVIT.

Wm. Scott Stewart, being first duly sworn, states that he appeared as attorney for Roger Touhy and those indicted with him in St. Paul Minnesota in the Federal Court where the said defendants were acquitted after a trial lasting some weeks. Without going into detail, this affiant states that the amount of money received from the defendants was not sufficient to pay the actual expenses incurred and paid by this affiant. This affiant has made a practice for some years past of taking a winter vacation accompanied by the family of this affiant, and while in St. Paul this affiant had been informed by his clients that they were of the opinion that they would not be tried in the Factor case as they had been told in the detective bureau at Chicago that Factor had not identified them, and that this affiant believed from the conduct of the authorities in Cook County, they having had the defendant in custody there and permitted them to be removed to St. Paul, that there was nothing to the Factor case, and, while it is true that the indictment in the Factor case was returned on November 8, 1933, just about the time that the St. Paul case was to go to trial before a jury, this affiant did not take the same seriously as this affiant has been led to believe from previous experience that the officials and newspapers invariably institute a campaign against defendants in order to prejudice, if possible, the minds of prospective jurors just before the jury is to be selected.

This affiant further states that the defendants were moved to this county, this affiant having advised them to not resist extradition, and lodged in the county jail in the Factor case. This affiant had not been paid by the defendants as they had promised in St. Paul, and this affiant, 54 therefore, notified the said defendants that this affiant would not file his appearance in the Factor case. Arrangements having been made for a winter vacation, this affiant left the country and did not return until shortly after the first of the year 1934. Meanwhile, the Public

Defender of Cook County had been appointed for the said defendants in the Factor case, and numerous motions made in behalf of the defendants including a petition for change of venue from the Honorable Harry B. Miller. The relatives of the defendants appealed to those in the office of this affiant in this affiant's absence stating that they did not want the services of the said Public Defender and they assured those in the office of this affiant that they would pay the money to retain this affiant and thereby induced one Aaron Gerch, a young lawyer who works in conjunction with a lawyer tenant of this affiant, to file his appearance for the said defendants. This affiant further states that he is informed and believes that the said public defender while representing the said defendants refused when requested by the defendants to apply for a change of venue, and that the said Aaron Gerch in order that said application might be made then filed his appearance. When this affiant returned to Chicago on January 7, 1934, he found that the matter had been set before the Honorable Michael Feinberg for disposition of preliminary motions on January 8, 1934, and that the trial was set for January 16th. The time afforded this affiant was not really sufficient to make proper preparation, but the court indicated very strongly that no continuance would be entertained and this affiant believing that the selection of a jury should take some time made no move for a continuance, relying upon the ability of this affiant to make preparation before the actual taking of testimony. This affiant did not wish to make application for a continuance or did not refuse to appear in the cause for the reason that it had been insinuated that the vacation taken by this affiant was

55 merely for the purpose of delaying the prosecution in order that Factor might return to England by force of the warrant of extradition and that the prosecution be defeated. So, this affiant appeared in the case and relied upon promises of money which have not been kept, and, feeling that the exact amounts received are matters between attorney and client and confidential, this affiant does not state the amounts but represents that the amounts received were entirely inadequate, barely covering the amount of actual expenses involved.

This affiant further states that before this affiant left on his vacation the defendants brought up the subject of the matter of the trial judge, and although this affiant

realizes that every judge assigned to the criminal court would endeavor to grant a fair and impartial trial to any defendant, the statute having given a defendant the right to change of venue, and with four defendants accorded the privilege of eliminating two judges, the matter of the various judges naturally became a topic of conversation, and this affiant was of the opinion that Judge Feinberg and Judge Fardy would be in a position possibly a little better than the other judges concerning the matter of a fair trial.

The jury having disagreed, this affiant was of the opinion offhand that a retrial should be regarded as a new trial. The practice, as this affiant understands it to have been for some years past, is for the trial judge upon a disagreement to reassign the case. When Judge Feinberg discharged the jury, he stated from the bench that the trial would proceed again in ten days and as this affiant had not been retained this affiant stated that there were matters to be adjusted between himself and his clients before this affiant could state whether or not this affiant would be ready for trial; Whereupon, the judge stated that he regarded the new trial as the same case and thereby handicapped this affiant in his dealings with his clients.

56 This affiant by reason of his continuous engagement in said trial has been compelled to postpone matters concerning other clients including a reply brief in cause No. 22276 pending in the Supreme Court of Illinois, the preparation of which this affiant regarded as important to the case for which this affiant had been paid, so this affiant devoted himself after the disagreement insofar as he could to the preparation of said brief. During the work on said brief there was delivered at the office of this affiant a letter from Judge Feinberg requesting that this affiant appear before him on February 9, 1934, and although this affiant was not legally obligated to do so, and although he could not very well spare the time from his other business, this affiant appeared in court on February 9th and was appointed to represent the above defendants. This affiant protested against said appointment and endeavored to explain his position and had a long conference in chambers in the presence of the State's attorney with the said Judge Feinberg, but the said judge insisted upon adhering to his intention to force the case to trial and to compel this affiant to accept said appointment or go to jail, in spite of the fact that this affiant explained to Judge Feinberg

his lack of adequate compensation and the further fact that the defendant Touhy is the owner of considerable property and a large and valuable estate on River Road in Cook County. As this affiant explained to Judge Feinberg, he is being put in the position of defending himself possibly at the expense of prejudicing his clients and now in view of the insistence of Judge Feinberg to compel this affiant to continue to represent the defendants without pay, this affiant endeavors and undertakes to point out those things which happened during the trial indicating clearly to this affiant that the said Judge Feinberg is prejudiced against the defendants and against this affiant.

57 There has been introduced into evidence in this case about seventeen hundred dollars in currency which has not been identified in any way as having been the proceeds of any crime. The said money introduced has been assigned to this affiant by the said defendants a long time prior to the commencement of the last trial, but in view of the fact that the Federal authorities would not recognize any claim made by this affiant, the said money has been in their possession. Affiant is ready and willing to waive any claim which he may have to said money and permit the same to be turned over to any attorney who might be ready and willing to undertake the defense of said defendants. So, affiant states that the said defendants are not without means requiring the appointment of an attorney and as affiant reads the act of the legislature concerning the matter of the appointment of attorneys affiant understands that the public defender should be appointed unless the defendants consent to the appointment of another attorney. Affiant states that the controversy over the matter of compensation has been such that affiant has been led to believe that the defendants do not wish that this affiant be appointed as attorney for said defendants.

In the first place, prior to their examination on voir dire, Judge Feinberg insisted over the objections of
58 this affiant upon lecturing the jurors, and this affiant feels that the effect of said lecture upon the said jurors was to make each and every juror hesitate to state his opinions formed upon newspaper readings, and the spirit of the law as understood by this affiant is that an attorney should be at least permitted to obtain an expression of opinion without any such lecture being given to the veniremen. When Factor took the stand this affiant sought to cross-examine him concerning a motive charged to exist

which would impel him to testify falsely as against these defendants and this affiant is of the opinion that Judge Feinberg unduly restricted the cross-examination of Factor. When the jury retired to consider of its verdict over the protest of this affiant Judge Feinberg called the jury into the box and orally instructed them that it was their duty to consult with their fellow jurors and arrive at an agreement if possible, and over the objection of this affiant, Judge Feinberg sent a written questionnaire to the jurors requesting that he be informed as to how they stood. This affiant is of the opinion that such conduct was improper, unlawful, and contrary to the interests of the defendants. When the jury had been out twenty-five hours, Judge Feinberg recalled them to the box and discharged them for failure to agree and this affiant is of the opinion that all of the circumstances surrounding said discharge are such that the defendants have been in jeopardy and that they cannot be tried again on this charge. At least this affiant feels that if he is to represent the defendants they are entitled to their plea of former jeopardy and that they are entitled to a hearing before some other judge concerning the fact surrounding the discharge of said jury and in determining whether or not the jury was kept together a reasonable length of time under the law it will be necessary to introduce the testimony of all those concerned, including that of Judge Feinberg.

The hurry of the State's Attorney to put the defendants to trial can be easily understood as the conduct of a partisan, and it is not to be wondered at that he might prefer to have the defendants go to trial without proper preparation, but this affiant respectfully represents that it would be unfair to rush these defendants to trial immediately after a former trial for the following reasons, among other:

Affiant is informed through newspaper accounts that Mrs. Rella Factor, wife of John Factor, is in Los Angeles out of the jurisdiction of this court and affiant had no opportunity because of the press of other matters and because of not having been retained to get the said Rella Factor under subpoena for another trial. Affiant states that the claim of the defendants as made in the former trial and which should be made in any future trial is that Factor and his relatives are giving perjured testimony and in support of that claim it is important to show that Factor, his wife, the said Rella Factor, and his son, Jerome Factor, all identified the de-

fendant Sharkey, who is now deceased, and put Sharkey in different places in such a way as to make the testimony of all of them as to this ridiculous. So that these defendants cannot safely go to trial until it is assured that Mrs. Factor and Jerome Factor be under subpoena.

During the trial a colored chauffeur, namely Reddick, identified a man he had seen standing in the yard of the Dells roadhouse on the night of the occurrence as one of the kidnappers. Affiant, by reason of the lack of time has not been able to place the said Reddick under subpoena, this affiant not having the address of said Reddick. A. L. Epstein, who was with Factor at the time of his alleged kidnapping and an eye witness thereto stated upon the trial that the defendants were not the men. It is important for the defendants that he be under subpoena before the trial starts. By reason of information which has come to this affiant during the trial there are many matters which
60 have been brought to the attention of this affiant concerning the witnesses who appeared for the State which require investigation and which necessitates a reasonable length of time for proper preparation.

Affiant is informed through newspaper accounts that the defendant Basil Banghart has been arrested in Baltimore, Maryland, in company with another man named Kostner and that Factor is on the way to view them in order to determine whether or not he shall identify them. The defendants have had no opportunity of investigating this angle of the case as they are in jail and were at the time that it is charged that Banghart attempted to collect a balance of ransom money. Affiant respectfully represents that the defendant should be afforded an opportunity to investigate the facts concerning any connection Banghart might have herein.

Affiant wishes to be distinctly understood in his position that the defendants are entitled to a defense and this affiant is ready and willing to defend them, but in view of the fact that they are in possession of means, this affiant believes that in all fairness to him that he should be paid before he is required to defend them and that from the knowledge that this affiant has obtained from the case, this affiant is of the opinion that these defendants cannot be properly defended without sufficient time in which to prepare their defense and without sufficient funds available to enable this affiant to make necessary investigations, and if this affiant is compelled to go to trial without proper preparation and

without sufficient remuneration, the defendants would be handicapped and this affiant would be handicapped in presenting a proper defense.

This affiant respectfully prays that the cause be transferred to some other judge for trial for the reasons above stated and that the defendants be afforded a reasonable opportunity to prepare for a new trial. In order that this affiant might be free to negotiate with his clients concerning the matter of any new trial, this affiant respectfully
61 prays that he be relieved from the appointment of the court and that he be permitted to withdraw as attorney for the said defendants.

(Signed) V. m. Scott Stewart.

State of Illinois }
County of Cook } ss.

Wm. Scott Stewart, being first duly sworn, states that he has read the above and foregoing affidavit, by him subscribed, and that the same is true, except as to those matters which he states to be upon information and belief, and as to those matters affiant states that he believes them to be true.

(Signed) Wm. Scott Stewart.

Subscribed And Sworn To before me this 12th day of February, A. D. 1934.

(Seal)

Charles R. Aiken,
Notary Public.

Filed Feb-13 1934
Criminal Court of Cook County
George Seif, Clerk

62 State of Illinois, }
County of Cook } ss.

I, Vincent J. Poklacki, Clerk of the Criminal Court of Cook County, in said county and State, and Keeper of the Records and Seal thereof, do hereby certify the above and foregoing to be a true, perfect and complete copy of Affidavit of William Scott Stewart filed February 13th, A. D. 1934 in a certain cause lately pending in said Court, wherein The People of the State of Illinois were Plaintiffs, and Roger Touhy alias (Impleaded) was Defendant.

Witness, Vincent J. Poklacki, Clerk of said Court, and the Seal thereof, at Chicago, in said County, this third day of March, A. D. 1948.

Vincent J. Poklacki,
Clerk.

63

Exhibit "C".

Testimony of Ella Costner.

From: (Abst. of Rec. p. 369.)

"I live in Cosby, Tennessee, and I am a sister of Isaac Costner, who testified here. I had a county school education and one year in high school and one year in college and three years of graduate nurse. I know the defendant Basil Banghart sitting at the table. I met him two years ago. My father and mother live in Newport, Tennessee, about forty-eight miles from Knoxville, Tenn., which is about seventeen miles from where I have my home. My brother Isaac Costner was down around in Tennessee there the latter part of June and the early part of July, 1933. I went into Newport about the 1st of July or somewhere around that date, and bought supplies for the 4th of July. Around the early part of July and the last part of June I saw the defendant Basil Banghart around there where I live and where Costner lives. I went to my home and took him to my father's home on the trip that I made to buy supplies for the 4th. He looked sick and his appetite wasn't good and I have a little tourist place or summer resort up to Smokey Mountains Park, it is very nice up there, cooler than it is in town, and I took him out home with me. He stayed about ten days. And it was my understanding that my brother Isaac was down around my father's home, around that part of the country, during that time."

Statement of Jim Jenkins.

**State of Tennessee,
Cocke County.**

I, Jim Jenkins, after being duly sworn, state as follows:

That on or about the 2d day of July, 1933, Rufus Costner came to my home on White Oak Street in Newport, Tennessee. He then went back to the business part of Newport, and came back to my house about 4:30 P. M. and brought some beer with him. He and I drank the beer. He then left and came back again about 6:30 P. M., and the last time he came back, his brother, Isaac Allen Costner, was with him in the car. I did not talk to Isaac Allen Costner at this time, but saw him in the car and talked to his brother, Rufus Costner.

This statement is made voluntarily and in the interest of justice.

Jim Jenkins.

Sworn to and subscribed before me, this March 10, 1934.

**Mary Rutherford,
Notary Public.**

My commission expires May 14, 1935.

Exhibit "E".

Statement of Ruth Jenkins.

State of Tennessee,
Socke County.

I, Ruth Jenkins, after being duly sworn, state as follows:
I am eighteen years old and a daughter of Jim Jenkins,
who has made an affidavit in this matter.

On or about July 2, 1933, I had been riding around in
Newport in a car with Rufus Costner. He left me at the
home of my father in the afternoon, and came back later
to my father's home, about 6:30 P. M., with his brother,
Isaac Allen Costner, in the car with him. They stayed at
my father's home about fifteen minutes, and I got in the
car with both of them and drove over to the home of Isaac
Allen Costner's father in Newport, Tenn. All of us got
out of the car and went into the home of Isaac Allen Cost-
ner's father, and I visited a while and then went back to
my home.

This statement is made voluntarily and in the interest of
justice.

Ruth Jenkins.

Sworn to and subscribed before me, this March 10, 1934.

Mary Rutherford,
Notary Public.

My commission expires May 14, 1935.

Affidavit of Lizzie Rogers.

State of Tennessee }
County of Knox } ss.

Lizzie Rogers, being first duly sworn under oath, deposes and says that she resides at 226 Harvey Street, Knoxville, Tennessee; that she has resided in the said City of Knoxville, Tennessee, for a period of more than ten (10) years.

Affiant further states that she is a woman of the age of sixty-four (64) a widow, the mother of six (6) children, the grandmother of fourteen (14) children and the great grandmother of one (1) child.

Affiant further states that one (1) of her grandchildren is the wife of one Basil Banghart, who is now an inmate in the Illinois State Penitentiary at Joliet, Illinois; that her great grandchild is the child of the said Basil Banghart and her grandchild Mae.

Affiant further states that she knew and was well acquainted with the said Basil Banghart and also with one Isaac Costner, both of whom were residents of the City of Knoxville, Tennessee; that the said Isaac Costner, to the best of her knowledge and belief is also confined in a penal institution.

Affiant further states that she was well acquainted with not only the said Isaac Costner but also his wife and children.

Affiant further states that on July 2, 1933, at or about 7:00 P. M., the said Banghart and Isaac Costner came to her home; that at that time she lived at 805 Selma Avenue in the city of Knoxville, Tennessee.

Affiant further states that the incident of the visit of the said Basil Banghart and Isaac Costner on July 2, 1933, is an outstanding incident; that the reason for the said incident being outstanding was that this affiant received a sum of money from the said Banghart; that at the above said date and time the said Banghart, upon entering the home of this affiant, stated to her as follows: "Mother, I have a present for you," and then and there handed to this
67 affiant a sum of money; affiant further states that on the said date, immediately after the departure of the said Basil Banghart and Isaac Costner she went to the

grocery store of Maxwell Brothers and out of the money given to her by the said Basil Banghart she paid a long-standing grocery bill owed by her to the said Maxwell Brothers and also purchased for herself new shoes and clothing.

Given under my hand and seal this 26th day of March A. D. 1937.

Lizzie Rogers (Seal)

I witnessed the signature of
Lizzie Rogers.

M. Ruth Roberts,
1710 Washington Ave.,
Knoxville, Tenn.

Subscribed and sworn to before me this 26th day of March A. D. 1937 by the said Lizzie Rogers as her free and voluntary act.

Maude LeBow (Seal)
Notary Public.

(Seal.

My commission expires April 9, 1939.

Affidavit of Mrs. Ruth Mullinux.

State of Tennessee, }
County of Knox. } ss.

Ruth Mullinux, being first duly sworn under oath, deposes and says that she is a resident of the City of Knoxville, Tennessee, having resided therein for a period of twenty-three years; that her home address is 528 West Glenwood Avenue in that city.

Affiant further states that she knew and was acquainted with Isaac Costner, who was formerly a resident of the City of Knoxville, Tennessee, but who is now confined in a penal institution.

Affiant further states that during a portion of the year 1933 and for some time prior thereto she was in the company of the said Isaac Costner and Basil Banghart in the City of Knoxville, Tennessee, and Gatlinburg, Tennessee;

that on many and numerous occasions she accompanied either one or both of them to shows, dances, etc.

Affiant further states on many occasions in the spring of 1933 this affiant and a girl friend of this affiant accompanied the said Basil Banghart and Isaac Costner and Rufus Costner, a brother of Isaac Costner, on various trips to Gatlinburg, Tennessee.

Affiant further states that the said Basil Banghart, Isaac Costner and Rufus Costner, a brother of Isaac Costner, were seen by this affiant during the months of June and July 1933; that particularly on June 30, 1933, she, this affiant, a lady friend of hers, and Basil Banghart and Isaac Costner, attended a wrestling watch at the Lyric Theatre.

Affiant further states that on the above said date she lived at 303 East Baxter Avenue; that at or about 1:00 P. M. said Basil Bankhart called at the home of this affiant and requested that this affiant procure a lady friend for the purpose of accompanying Isaac Costner and the said Basil Banghart to a wrestling match, which was then and there being staged at the Lyric Theatre as hereinabove stated; that this affiant informed the said Bang-
69 hart that she would be able to procure a friend for

Isaac Costner and that she, this affiant, and her lady friend would be dressed and ready at 7:30 P. M.; that this affiant was informed by the said Banghart that it would be impossible for him, the said Banghart and Isaac Costner to call for this affiant and her friend before 8:00 or 8:30 P. M.; that this affiant protested at the late hour for calling for them for the purpose of attending the wrestling match, this affiant stating that as long as they were going to a wrestling match they may as well see the entire show; that said Banghart stated that it would be impossible for Isaac Costner to be there any sooner than 8:30 P. M. for the reason that they had an appointment for 8:00 elsewhere.

Affiant further states that the said Isaac Costner and Basil Banghart did call for herself and her lady friend who was then and there at her house and that on the said date and at the time of 8:30 P. M. this affiant, her lady friend, Isaac Costner and Basil Banghart did attend a wrestling match at the Lyric Theatre in the said city of Knoxville, Tennessee.

Affiant further states that on the following day, July 1,

1933, she again saw Isaac Costner and Basil Banghart in the said city of Knoxville, Tennessee, at the home of this affiant; that said Isaac Costner and Basil Banghart came to the home of this affiant in an automobile, arriving there about 2:00 P. M.; that Banghart and Costner came to her house the said day and at the said time and requested her to arrange for a party that evening with herself and another lady friend and Banghart and Costner; that this affiant informed them that due to the illness of her baby it would not be possible for her to arrange for any party that evening.

Affiant further states that on July 4, 1933, this affiant and two lady friends accompanied Isaac Costner, Basil Banghart and Rufus Costner to Gatlinburg, Tennessee; that while in Gatlinburg they fished, danced and enjoyed themselves for a period of about three or four days; that they thereafter returned to Knoxville, Tennessee.

70 Affiant further states that for several days subsequent to their return from Gatlinburg she again saw and was in the company of the said Isaac Costner and Basil Banghart on various and numerous occasions in the City of Knoxville, Tennessee.

Given under my hand and seal this 29th day of March A. D. 1937.

Ruth Mullinux (Seal)

I witnessed the signature of Ruth Mullinux this 29th day of March, 1937.

M. Ruth Roberts
1710 Washington Ave.,
Knoxville, Tenn.

Subscribed and sworn to before me this 29th day of March A. D. 1937 by the said Ruth Mullinux as her free and voluntary act.

(Seal)

Maud Lebow (Seal)
Notary Public.

My commission expires April 9, 1939.

Affidavit of Marie Flinchum

State of Tennessee, } ss.
 County of Knox.

Marie Flinchu, first being duly sworn under oath, deposes and says:

That she is a resident of Knoxville, Tennessee, having resided therein for a period of 28 years; her home address being 315 Rader Place in said City and State.

Affiant further states that she is keeping house for herself and family; that she resides with her parents, sisters and brothers.

Affiant further states that she knew and was well acquainted with Isaac Costner and Basil Banghart, both of whom were residents of the City of Knoxville, but who are now in penal institutions.

Affiant further states that during the year of 1933 and some time prior thereto she was in the company of Isaac Costner and said Banghart in the City of Knoxville, Tennessee; that particularly the first week in July 1933 she, this affiant, and a lady friend of hers, one Ruth Mullinux, accompanied the said Isaac Costner and Banghart to various affairs and shows; affiant further states that on July 1st, 1933 Isaac Costner and Banghart came to her home in an automobile some time in the afternoon; that this affiant, the said Banghart and Costner and a lady friend of this affiant's went for a long drive and visited several road-houses.

Affiant further states that on July 4, 1933, this affiant and two other girls accompanied Isaac Costner, Basil Banghart and Rufus Costner to Gatlinburg, Tennessee; that they stayed in Gatlinburg for a period of about three days; that they thereafter returned to Knoxville, Tennessee.

Affiant further states that for several days subsequent to their return from Gatlinburg she again saw and was in the company of the said Isaac Costner on various and numerous occasions in Knoxville, Tennessee.

72 Affiant further states that while in Gatlinburg in the company of the said Isaac Costner, Banghart and

Rufus Costner and her girl friends, that she, this affiant, and the others mentioned herein did read about in the newspapers and discussed the Factor kidnapping case in Cook County, Illinois.

This affiant distinctly recalls reading about the above said case during the period of time she and the others mentioned were in Gatlinburg and that the said Isaac Costner, as well as the others in the party, displayed great surprise and interest in the said case.

Given under my hand and seal this 1st day of April A. D. 1937.

Marie Flinchum (Seal)

I witnessed the signature of Marie Flinchum.

Pearl Rash,
Knoxville, Tenn.

Sworn to and subscribed to before me this 1st day of April, A. D. 1937 by Marie Flinchum as her free and voluntary act.

Maud Lebow (Seal)
Notary Public.

(Seal)

My commission expires April 9, 1939.

Affidavit of Walter Flanagan

State of Tennessee, }
County of Knox. } ss.

Walter Flanagan, being first duly sworn on oath, deposes and says that he resides at 416 Cumberland Avenue, Knoxville, Tennessee; that he is thirty-six (36) years of age and was formerly employed as a fireman by the City of Knoxville.

Affiant further states that he knew and was well acquainted with one Isaac Costner, who was a resident of the City of Knoxville, Tennessee, but who is now confined in a penal institution.

Affiant further states that he has been in the company of the said Isaac Costner during part of the months of June and July of 1933; that for a period of two or three weeks, between the 29th day of June, 1933, and on or about the 12th day of July, 1933, this affiant was in the company of the said Isaac Costner on numerous occasions in the city of Knoxville, Tennessee.

Affiant further states that on the 30th day of June, 1933, he accompanied the said Isaac Costner and Rufus Costner, his brother, to the home of Eliza Blalock at 603 Rouser Street in the said City of Knoxville, Tennessee; that this affiant and Isaac Costner and Rufus Costner went to the said address in an automobile; that upon arriving at the said address they parked the car immediately in front of Mrs. Blalock's home; that this affiant remained in the car while Isaac and Rufus Costner stepped out of the car and walked towards the house; that Isaac Costner took with him a suit case, stating that he would leave the said suit case in the home of Mrs. Blalock.

Affiant further states that Rufus Costner did not enter the home of Mrs. Blalock but that Isaac Costner was the only one who entered the home; that the time of their arrival to the home of the said Mrs. Blalock was about 8:00 P. M.; that said Isaac Costner did not remain in the house very long; that the said Isaac Costner came out of the home of the said Mrs. Blalock and stated to this affiant, in the presence of Rufus Costner, that he was going to leave

the suit case with Mrs. Blalock until the following day.

74 Affiant further states that on the following day, July 1, 1933, he again accompanied Isaac Costner and his brother, Rufus Costner, to the home of Eliza Blalock at 603 Rouser Street, Knoxville, Tennessee; that they again drove there in an automobile; that this affiant did not enter the home of the said Eliza Blalock but that the said Isaac Costner alone entered the said house.

Affiant further states that they arrived at the home of Mrs. Blalock at or about 8:00 P. M.; that the said Isaac Costner did not stay very long in the house but came out soon after entering with the suit case that he, the said Isaac Costner, had left there the night before.

Given under my hand and seal this 26th day of March A. D. 1937.

Walter Flanagan (Seal)

I witnessed the signature of Walter Flanagan.

M. Ruth Roberts,
1710 Washington Ave.,
Knoxville, Tenn.

Subscribed and sworn to before me this 26th day of March A. D. 1937 by the said Walter Flanagan as his free and voluntary act.

Maud LeBow (Seal)

(Seal)

Notary Public.

My commission expires April 9, 1939.

Affidavit of Grace Birmingham

State of Tennessee, }
County of Knox. } ss.

Grace Birmingham, being duly sworn under oath, deposes and says;

That she is a resident of the County of Knox, City of Knoxville, Tennessee; having resided in said City for a period of 25 years;

That she lives at 404 Ben Hur Avenue in the said City;

Affiant further states that she is married and the mother of a daughter of twenty;

That for many years she was engaged in the cleaning business in said City of Knoxville, Tennessee.

Affiant further states that she is now engaged in the rooming house business in the said City of Knoxville, Tennessee.

Affiant further states that she knew and was well acquainted with one Isaac Costner who resided in Knoxville, Tennessee, but who is now confined in a penal institution; that she was well acquainted with and knew one Basil Banghart who for a period of time during the year of 1933 also resided in the said City of Knoxville, Tennessee.

This affiant further states that during the year 1933 she had occasion to see the said Isaac Costner, his wife and children on several occasions; that she had occasion to see the said Basil Banghart on many and numerous occasions during the year of 1933.

Affiant further states that particularly the period of time during June 30, 1933 and for a week or two thereafter she saw the said Basil Banghart and Isaac Costner on numerous occasions.

Affiant further states that there are a group of persons in the City of Knoxville known as the Cunningham family, which said Cunningham family are the relations of the mother of this affiant; that it is customary for the said Cunningham family to hold a reunion at least once a year; that the said reunions have been so held and conducted for the past 20 years up to and including the last Sunday in June of the year 1933.

76 That at the reunion in 1933 which took place on the last Sunday in June 1933, the said Banghart and Costner appeared at her home for the purpose of seeing a brother of this affiant, Walter Flanagan; that the said Banghart and Costner talked with Walter Flanagan for a considerable length of time at her home.

Affiant further states that on an average of two or three times a week after the said reunion the said Banghart and Costner called at the home of this affiant for the purpose of meeting the brother of this affiant, Walter Flanagan.

Affiant further states that the Sunday following the reunion hereinbefore mentioned, the said Banghart and Costner again called at the home of this affiant and there met her brother, Walter Flanagan, and after spending several hours left the home of this affiant.

Affiant further states that she had occasion to and did see Isaac Costner and Basil Banghart for a week or ten days subsequent thereto in the said City of Knoxville, Tennessee.

Given under my hand and seal this 30th day of March A. D. 1937.

Grace Birmingham (Seal)

I witnessed the signature of Grace Birmingham.

Pearl Rash,
Knoxville, Tenn.

Subscribed and sworn to before me this the 30th day of March A. D. 1937 by the said Grace Birmingham as her free and voluntary act.

(Seal) Maud LeBow (Seal)
Notary Public.

My commission expires April 9, 1939.

Affidavit of Joe Hunt

State of Tennessee, }
County of Knox. } ss.

In the Criminal Court for the County of Cook,
State of Illinois.

Personally comes Joe Hunt, who being first duly sworn by me states on oath as follows:

My name is Joe Hunt. I am 38 years of age. I am a citizen of the State of Tennessee, United States of America, and at present am living at 114 West Cumberland Avenue in the City of Knoxville, Tennessee.

I have known Ike Costner for a long time, ever since he ran off from the army, that was in war time.

I have traded with him off and on since the war. I remember the night after the 4th of July, 1933, when me and Tommie Webb went through Newport and on up the creek in my car.

They had been some carloads of liquor took away from the boys up in there and I went up to see if there was anything I could do about it. We passed Costner and some man in his car soon after we went through Eastport and they were driving slow coming towards Newport, they were in a black sedan automobile. I know it was Costner's car because I saw him in it before and after this time. It had a new kind of horns on it. I don't know what make of car it was but it was a new model and different from any other car around here at that time.

We drove slowly on up to near John B. Allen's store and they followed us and we stopped and they passed us driving slow. It was a small like man with Costner and I believe from the picture in the paper that the man with him was Banghart as he gave me several good hard looks when they passed me and I was driving my car and Costner was driving his car. They did not speak to us nor I didn't speak to them, as I knew Costner was wanted by the law and I didn't have any business messing with him.

78 I have no interest in the lawsuit or matters and make this affidavit of my will and accord.

(Signed) Joe Hunt.

Sworn to by me and subscribed to in my presence the 10th day of March, 1934.

(Signed) S. J. Thornburgh,

(Seal)

Notary Public for
Knox County,
Tennessee.

My commission expires Oct. 14, 1936.

79

Exhibit "L".

Affidavit of Tom Webb.

State of Tennessee }
County of Knox } ss.

In the Criminal Court for Cook County in the State of Illinois.

Personally comes Tom Webb, who being first duly sworn by me states on oath as follows:

My name is Tom Webb. I am 26 years of age. I am a citizen of the State of Tennessee, United States of America and at present am living at 114 West Cumberland Avenue in the City of Knoxville, Tennessee.

I have known Isaac Costner of Newport, Tennessee, for a number of years. I don't know just how many but I have been doing business with him ever since right after the war. I understood that when I first began to buy whiskey from him he was a deserter from the United States Army. He lived above Newport. Later he moved to Knoxville and went into the wholesale business and I traded with him practically all of the time when he and Jack McGill were in partners. I knew that he was staying up around Newport where he made whiskey for a while when the law was looking for him, I mean the government law. I would see him frequently. I saw him several times in June, 1933, saw him here in Knoxville two or three times and I saw him up on the road that leads from Newport out towards Cosby on the night of the 4th of July, 1933. Joe Hunt and me were together in Joe's car going up the creek to get

some whiskey. There was a man in Costner's black sedan automobile with him. It looked to me like the law could have caught him if they had been trying. I do not know Basil Banghart personally, but the man's picture on the post office folder with Costner where they are advertising for his arrest is the same man that I saw with Costner when I saw him on the Cosby road.

I have no interest in the lawsuit or matters and make this affidavit of my own will and accord.

(Signed) Tom Webb.

80 Sworn to by me and subscribed to in my presence
this the 10th day of March, 1934.

(Signed) S. J. Thornburgh,
Notary Public for Knox County,
Tennessee.

(Seal)

My commission expires Oct. 14, 1936.

Affidavit of F. D. Underwood.

State of Tennessee }
County of Knox } ss.

In the Criminal Court for Cook County in the State of Illinois.

Personally comes F. D. Underwood, who being known by me and first being duly sworn states on oath as follows:

My name is F. D. Underwood. I am 38 years old. Am a citizen of the State of Tennessee, United States of America. At present live at 865 North Broadway, Knoxville, Tennessee. I was formerly a deputy sheriff in Grainger County, Tennessee. Grainger County is between Knox County and Cocke County in East Tennessee. I am acquainted with Isaac Costner who at one time lived in Knoxville, Tennessee, on the Paper Mill Road. I have known him for some time and know that occasion when he was charged with a conspiracy by the Government and ran away. I seen him a number of times while he was a fugitive but I did not have any warrant for his arrest. I frequently had business on the road between Crosby Creek, the mountainous section of Cocke County, near Newport and Knoxville.

I seen Costner and some other man who I think was Banghart in a car together. I was in Cocke County the night of the 4th of July, 1933, and I saw Costner and this man in an automobile and I was advised that either Costner or his brother had had an automobile wreck and don't remember just who was telling me about it.

I am not related in any way to the parties in this lawsuit and have no interest in it.

I have a case pending against me in the United States Court for this District.

I do not have funds sufficient nor would I undertake to come to Chicago as a witness unless my transportation and hotel bills were paid to me in advance and I don't know why they want me to make this affidavit but the above affidavit is a correct statement of the facts insofar as I know them.

(Signed) F. D. Underwood.

82 Sworn to by me and subscribed to in my presence this the 10th day of March, 1934.

(Seal) (Signed) S. J. Thornburgh,
Notary Public for Knox County,
Tennessee.

My commission expires Oct. 14, 1936.

Affidavit of Buford Roberts.

State of Tennessee, { ss.
County of Knox.

In the Criminal Court for the Cook County in the State of Illinois.

Personally comes Buford Roberts who being known by me and first being sworn states on oath as follows:

My name is Buford Roberts. I am a citizen of the State of Tennessee, United States of America. I am 34 years of age and am an unemployed automobile mechanic. I have known Isaac Costner of Newport, Cocke County, Tennessee, for more than ten years. I have had some business dealings with him during the prohibition era. I have dealt with him on numerous occasions. I know the subject Banghart when I see him. I was in and out of Newport, Tennessee, during the Spring and Summer of 1933, and seen both of the aforesaid men on different occasions. I remember particularly seeing them along about the first of July, 1938, as there was a carload of liquor hijacked about the third of July near Newport, and I saw them immediately before and after this whiskey was taken. I have passed them both together in Costner's car on the highway as they were hiding from the law I paid particular attention when I would see that they were out on the road.

(Signed) Buford Roberts.

I knew that the law was looking for them especially for Costner. Neither of them are especial friends of mine and I am not interested in what happens in their lawsuits, but I am willing to testify to the truth for the truth's sake.

I have in court charged with storing and possessing whiskey and have been convicted for that offense.

(Signed) Buford Roberts.

Sworn to by me and subscribed to in my presence this 10th day of March, 1934.

(Seal) (Signed) S. J. Thrburgh,
Notary Public for Knox County,
Tennessee.

My commission expires, Oct. 14, 1936.

84

Exhibit "O".

Affidavit of Jack McGill.

State of Tennessee, }
County of Knox. } ss.

I, Jack McGill, being first duly sworn state that I have known Ike Costner for a number of years. He was in Knoxville, Tennessee, about the 8th of July, 1933. I remember he took a boy named Nastus Wife out for a drive. I know about his being around Newport, Tennessee. I would not give him full faith and credit on oath.

I have been in trouble for liquor.

(Signed) Jack McGill.

Sworn to before me this March 8, 1934.

(Seal) (Signed) S. J. Thornburgh,
Notary Public.

My commission expires Oct. 14, 1936.

85

Exhibit "P".

Affidavit of Fred Dalton.

State of Tennessee, }
Knox County. } ss.

Personally appeared before me, S. J. Thornburg, a notary public in and for said county, the undersigned Fred Dalton, who being duly sworn by me, deposes as follows:

My name is Fred Dalton, RFD 5, Knoxville, Tennessee. I am a retired business man and trader. I formerly lived in a ten room frame building located at the same place my new stone house is now located.

I am personally acquainted with Ike Costner and Basil Banghart. They came to my house and rented a room from me and my wife. They came on or about July 9th, 1933, came about two o'clock in the morning, they knocked and Ike called me by my name and let them in and gave them a room and bed. They stayed around for two days and slept there two nights.

Exhibit Q.

When Costner said they were going to town and get their girls and come back that night, I say: Ike I have found out you are a fugitive from justice and I do not want you to come back to my place any more.

Ike looked at Banghart and said, Fred's sober, he knows what he is talking about and we'll have to go. Costner and me shook hands and he says, no hard feelings and I said no. I have known Ike Costner 8 years.

(Signed) Fred A. Dalton.

Sworn to before me and subscribed to in my presence this March 10, 1934.

(Seal) (Signed) S. J. Thornburgh,
Notary Public.

My commission expires, Oct. 14, 1936.

*Exhibit "Q".**Affidavit of Geo. Holbert.*

State of Tennessee, } ss.
Knox County.

Personally comes Geo. Holbert who says:

I have known Ike Costner for a number of years. I would not believe him on oath.

(Signed) Geo. Holbert.

Sworn to by me this March 10, 1934.

(Seal) (Signed) S. J. Thornburgh,
Notary Public.

My commission expires, Oct. 14, 1936.

87

Exhibit "R".

Affidavit of Eliza Blalock.

State of Tennessee, }
County of Knox. } ss.

Eliza Blalock, being duly sworn, deposes and says that she resides at 603 Rouser Street in the City of Knoxville, Tennessee.

That she is a widow and the mother of four children; that she has been a constant resident of the city of Knoxville for a period of over twenty-four years.

Affiant further states that she is now employed at Liebowitz & Son, shirt manufacturers as a machine operator in the factory of the said manufacturers in the city of Knoxville, Tennessee.

This affiant further states that having resided in the said city of Knoxville, Tennessee, for the many years as she has, it became her privilege to make the acquaintance and know many people in said city.

Affiant further states that she knows one Isaac Costner very well; that she had seen and talked to the said Isaac Costner in the said city of Knoxville many times on numerous occasions.

Affiant further states that on June 30, 1933, the said Isaac Costner, accompanied by Rufus Costner, his brother, and one Walter Flanagan, came to the home of this affiant at or about 8:00 P. M.; that when she heard a knock on the door she entered and admitted one of the three men, which said man was Isaac Costner; that his brother, Rufus Costner, remained on the porch while the third man, Walter Flanagan, remained seated in the automobile.

Affiant further states that on the above said day and at the same time the said Isaac Costner, upon entering her home, carried with him a suitcase and requested this affiant to permit him to leave the said suitcase in the home of this affiant; that the said Isaac Costner further stated to this affiant that he, the said Isaac Costner would call for the suitcase the following day.

Affiant further states that on the above said day and at the above said time the said Isaac Costner gave to this
88 affiant a sum of money, a portion of which said sum

of money this affiant was to pay the landlord of this affiant for rent and several other obligations.

This affiant further states that on the following day, July 1, 1933, at or about 8:00 P. M., the said Isaac Costner, his brother and Walter Flanagan, returned to the home of this affiant, arriving there in an automobile; that Isaac Costner rapped on the door and was admitted to the house by this affiant; that the said Isaac Costner requested his suitcase and took the same with him.

Affiant further states that the above dates are definitely fixed in her mind by an outstanding incident, which said incident was a meeting of the Union of which she is a member, Local No. 90 of the Amalgamated Clothing Workers of America, which this affiant attended on July 1, 1933, that due to the visit of the said Isaac Costner this affiant was delayed in attending the said meeting of Local No. 90 of the Amalgamated Clothing Workers of America; that a fellow member of the said Union by the name of Mildred Roberts, a resident of the city of Knoxville, Tennessee, called on this affiant for the purpose of accompanying her to the said meeting; that the said Mildred Roberts became very impatient while waiting for this affiant to accompany her to the said meeting and because of the delay this affiant and her co-member arrived late at the meeting.

(Signed) Eliza Blalock.

The signature of Eliza Blalock
was witnessed by me:

(Signed) M. Ruth Roberts,

1710 Washington Street, Knoxville, Tenn.

Subscribed and sworn to before me this 25th day of March, A. D. 1937 by the said Eliza Blalock as her free and voluntary act.

(Signed) Maud LeBow,

(Seal)

Notary Public.

My commission expires April 9, 1939.

89

Exhibit "S".

**State of Tennessee,
County of Knox.**

Personally appeared before me, the undersigned authority to administer oath, D. L. Shope, Affiant, who being first duly sworn according to law, makes oath that he is personally acquainted with Isaac A. Costner and has known him over a period of twenty years.

Affiant further makes oath that the said Isaac A. Costner was engaged in the illegal liquor traffic here in Knoxville, and Cooke County, Tennessee, from about 1930 to 1932. That he would not give Isaac A. Costner full faith and credit on oath; that he would not believe him on oath.

Affiant further makes oath that he is 54 years of age; that his home address is 719 Walnut Street, Knoxville, Tennessee; that he has no interest in the matter whatever; that he is not related to any of the parties, but makes this statement in order that justice may be done in the premises.

And further the Affiant sayeth not.

D. L. Shope.

Subscribed and sworn to before me this the 10th day of January, 1948.

Mildred B. McRae,
Notary Public.

(Seal)

Commission Expires: January 11, 1948.

State of Tennessee, }
County of Knox. } ss.

Personally appeared before me, the undersigned authority to administer oath, Walter R. Flanagan, Affiant, who being first duly sworn deposes and says:

That he is 46 years of age and his post office address is 114 West Baxter Avenue, Knoxville, Tennessee, and that he is now employed at the Irwin Plumbing Company, Gay Street, Knoxville, Tennessee.

Affiant further makes oath that he is acquainted with Isaac A. Costner and has known him since 1922. That on or about the first day of July, 1933, the said Isaac A. Costner, accompanied by Basil Banghart, came to his home at 708 W. Cumberland Avenue, Knoxville, Tennessee, to see him. That the purpose of their visit was to invite him to go to their cabin in Elkmont, Tennessee, a distance of about 65 miles from Knoxville, to spend the 4th of July holiday. That he was sick at that time and declined to make the trip with them because of his illness. That the said Costner and the said Basil Banghart visited with him on that occasion for an hour or more.

Affiant further makes oath that he has no interest in this matter but is willing to testify to these facts, if necessary.

And further the Affiant sayeth not.

Walter R. Flanagan,
Affiant.

Subscribed and sworn to before me this the 16th day of March, 1948.

(Seal)

Mildred B. McRae,
Notary Public.

Commission Expires: January 13, 1952.

91

Exhibit "U".

Penitentiary Mittimus

No. 9604

Will County Circuit Court

Be It Remembered, That afterward, to-wit: On the 30th day of November in the year last aforesaid, it being one of the regular days of the term of Court aforesaid, the following among other proceedings were had and entered of record in said Court, before the Honorable Roscoe C. South, one of the Judges of said Circuit, presiding, which proceedings were in the words and figures following, to-wit:

The People of the State of Illinois

vs.

No. 9604

Roger Touhy otherwise called
Roger Towhey, Hugh Basil
Banghart otherwise called Larry
Green, William Stewart, other-
wise called William S. Stewart
otherwise called William Brooks,
Martlick Nelson otherwise called
Matthew Nelson otherwise called
Martin Newtin otherwise called
Matt Norton.

Indictment For
Aiding Escape, etc.

This day come the said People, by James E. Burke, State's Attorney, and the said Defendants Roger Touhy otherwise called Roger Towhey, William Stewart otherwise called William S. Stewart, otherwise called William Brooks, and Martlick Nelson otherwise called Matthew Nelson otherwise called Martin Newton otherwise called Matt Norton in their own proper person also come in pursuance of the Writ of Habeas Corpus heretofore issued herein, and also comes Irving S. Roth, attorney for Roger Touhy otherwise called Roger Towhey and Charles M. Robson and F. Donald Delaney, attorneys for William Stewart otherwise called William S. Stewart, otherwise called William Brooks, and Martlick Nelson otherwise called Matthew Nelson otherwise called Martin Newton otherwise called Matt Norton.

And the briefs of all parties having been heretofore filed and considered by the Court, pursuant to advisement, it is now ordered by the Court that the defendants' motions for a new trial of this cause be and are now denied.

Whereupon each defendant is given an opportunity to state why sentence should not be pronounced upon him, and said statements are thereupon made.

After which neither said defendants nor their counsel for them saying anything further why the judgment and sentence of this Court should not now be pronounced against them on the verdict of guilty heretofore rendered by the jury to the indictment in this cause.

Therefore, pursuant to the verdict of the jury finding the said defendant Roger Touhy otherwise called Roger Towhey guilty of crime of Aiding Escape, etc., in manner and form as charged in the indictment in this cause, the judgment and sentence of this Court, is that the said Roger Touhy otherwise called Roger Towhey be taken from the bar of this Court and returned to the Illinois State Penitentiary from whence he came, and be delivered to the Warden or Keeper of said Penitentiary and the said Warden or Keeper is hereby required and commanded to take the body of said defendant Roger Touhy otherwise called Roger Towhey and confine him in said Illinois State Penitentiary in safe and secure custody for and during the term of 199 years from and after delivery hereof, and according to law, that he be thereafter discharged.

Therefore, pursuant to the verdict of the jury finding the said defendant William Stewart, otherwise called William S. Stewart otherwise called William Brooks guilty of crime of Aiding Escape, etc., in manner and form as charged
92 in the indictment in this cause, the judgment and sentence of this Court, is that the said defendant William Stewart, otherwise called William S. Stewart otherwise called William Brooks be taken from the bar of this Court and returned to the Illinois State Penitentiary from whence he came, and be delivered to the Warden or Keeper of said Penitentiary and the Warden or Keeper is hereby required and commanded to take the body of said defendant William Stewart, otherwise called William S. Stewart otherwise called William Brooks and confine him in said Illinois State Penitentiary in safe and secure custody for and during the term of 199 years from and after delivery hereof, and according to law, and that he be thereafter discharged.

Therefore, pursuant to the verdict of the jury finding the said Martlick Nelson otherwise called Mathew Nelson otherwise called Martin Newton otherwise called Matt Norton guilty of crime of Aiding Escape, etc., in manner and form as charged in the indictment in this cause, the judgment and sentence of this Court, is that the said defendant Martlick Nelson otherwise called Matthew Nelson otherwise called Martin Newton otherwise called Matt Norton be taken from the bar of this Court and returned to the Illinois State Penitentiary from whence he came, and be delivered to the Warden or Keeper of said Penitentiary and that the said Warden or Keeper is hereby required and commanded to take the body of said defendant Martlick Nelson otherwise called Mathew Nelson otherwise called Martin Newton otherwise called Matt Norton and confine him in said Illinois State Penitentiary in safe and secure custody for and during the term of 199 years from and after delivery hereof, and according to law, and that he be thereafter discharged.

It Is Further Ordered And Adjudged that the said Defendants pay the costs of this prosecution and that execution issue therefor.

State of Illinois, }
Will County. } ss.

I, Paul V. Wunder, Jr., Clerk of the circuit court of the county of Will, in the State aforesaid, and Keeper of the records and files of said Court, do hereby certify that the above and foregoing is a true copy of the final judgment and sentence entered of record in said Court in the case of the People of the State of Illinois *versus* Roger Touhy otherwise called Roger Towhey, William Stewart, otherwise called William S. Stewart otherwise called William Brooks, Martlick Nelson otherwise called Mathew Nelson otherwise called Martin Newton otherwise called Matt Norton as the same appears from the records of said Court now in my custody.

In testimony whereof, I have hereunto set my hand and seal of said Court, at Joliet, this 3rd day of May, A. D. 1934.

/s/ Paul V. Wunder, Jr.,
Clerk.

(Seal)

To the Sheriff of Will County to execute.

93 And afterwards on, to wit, the 8th day of October, 1948 came the Respondent by his attorneys and filed in the Clerk's office of said Court his certain Motion to Dismiss Petition and Deny the Issuance of the Writ of Habeas Corpus, in words and figures following, to wit:

94 IN THE DISTRICT COURT OF THE UNITED STATES.
 • • (Caption—48-C-448) • •

**MOTION TO DISMISS PETITION AND DENY THE
 ISSUANCE OF THE WRIT OF HABEAS CORPUS.**

The respondent, Joseph E. Ragen, Warden of the Illinois State Penitentiary, Joliet Branch, Joliet, Illinois, by George F. Barrett, Attorney General of the State of Illinois, his attorney, for this his motion to dismiss the petition for writ of habeas corpus heretofore filed herein shows unto this Honorable Court:

1. That the petitioner is in the custody of the respondent by virtue of two mittimi:

(a) A mittimus issued out of the Criminal Court of Cook County on February 24, 1934, wherein a jury found petitioner guilty of the crime of kidnapping for ransom, and on said verdict was sentenced to a term of 99 years;

(b) A mittimus which issued out of the Circuit Court of Will County, the September 1943 term, wherein the petitioner was found guilty of aiding in the escape of a
 95 convicted prisoner. The petitioner, on the judgment, received a sentence of 199 years.

Copies of the mittimi wherein the judgment of the court is contained are attached hereto marked Exhibits "A" and "A1" and by reference made a part hereof.

2. That the petitioner herein is being held under a judgment as aforementioned in paragraph 1, sub. (b) ante, which has never been set aside or tested as to its validity in the state courts, and since, as a matter of law, that judgment is presumed to be valid (*U. S. v. John L. Lewis*, 67 S. C. 677; *U. S. ex rel. Rogalski v. Jackson*, 146 Fed. (2d) 251; *Parker v. Ragen*, 167 Fed. (2d) 792), and the petitioner has not served the maximum of his term as therein provided, the question as to the validity of his 99 year sentence is moot and that by reason thereof this Federal District Court is without jurisdiction to determine the issues of this case.

3. That the petitioner herein has failed to exhaust the remedies as provided to him by the State of Illinois, (*White v. Ragen*, 324 U. S. 760);

(a) Failure to sue out a writ of certiorari from the United States Supreme Court to review the Illinois Supreme Court's determination in *People v. Touhy*, 361 Ill. 332; that where a prisoner's conviction and sentence has been affirmed by the Supreme Court, all questions that might have been raised are forever settled by affirmation of the judgment whether or not they were included in the assignment of errors, (*People ex rel. Kerner v. Circuit Court*, 354 Ill. 363.);

(b) The petitioner has a petition for writ of certiorari now pending in the October 1948 term of the United States Supreme Court (*U. S. ex rel. Touhy v. Ragen*, No. 14) to review the denial of a writ of habeas corpus by the Circuit Court of Will County, and this court is without jurisdiction to proceed until a determination is had of the issues presented in said Court;

(c) The petitioner makes allegations which he raises for the first time in the Federal District Court without first having applied for relief to the Illinois courts—

1. As to the validity of the 199 year judgment rendered against him in the September 1943 term in the Circuit Court of Will County.

2. As to the acts of his counsel; therefore by reason thereof this court is without jurisdiction to determine said issues until the State court has had an opportunity to pass upon same. (*Mooney v. Holohan*, 294 U. S. 103, 114).

4. That the petition fails to allege that the purported perjury of the State's witnesses was done with the connivance or active conduct of the State. (*Hysler v. Florida*, 315 U. S. 411). The petitioner makes a positive allegation (P. 37 of Petition) that he "does not expressly aver that the State's Attorney's office suborned such perjured testimony".

5. Respondent further shows that such contentions were raised in the Illinois courts and that the Illinois State Supreme Court had an opportunity to pass upon the allegations presented, (*People v. Touhy*, 361 Ill. 332), and that the Federal District Court is bound by the decision of a State court where a review is had on the merits (*Jackson v. Brady*, 133 Fed. (2d) 476), and where the Supreme Court of the United States has reviewed or

has declined to review the decision of the State court, the Federal District Court should not re-examine the questions thus adjudicated. (*House v. Mayo*, 324 U. S. 42). Respondent further calls this Honorable Court's attention to the case of *People v. Touhy*, 397 Ill. 19, 29, wherein the court stated:

"In 1938 we carefully considered the petition for habeas corpus (*People ex rel. Touhy v. Ragen*, 24616) and the Supreme Court of the United States denied the petition for a writ of certiorari seeking a further review. (*Touhy v. Ragen, Warden*, 303 U. S. 657)." (*House v. Mayo, supra.*)

Wherefore, the respondent respectfully prays that the Court deny the issuance of the writ prayed for and dismiss the petition for writ of habeas corpus.

Joseph E. Ragen,
Warden Illinois State Peniten-
tiary, Joliet, Illinois.

By George F. Barrett,
Attorney General of the State
of Illinois.

State of Illinois, }
County of Cook. } ss.

Pleas, before a Branch of the Criminal Court of Cook County, in said County and State, at a term thereof begun and held at the Criminal Court House, in the City of Chicago, in said County, on the first Monday (being the fifth day) of February, in the year of our Lord one thousand nine hundred and thirty-four and of the Independence of the United States the one hundred and fifty-eighth.

Present: Honorable Michael Feinberg, Judge of the Circuit Court of Cook County, and Ex-Officio Judge of the Criminal Court of Cook County.

Thomas J. Courtney,
State's Attorney,

Wm. D. Meyering,
Sheriff of Cook County.

Attest:

George Seif, Clerk.

Be It Remembered, to-wit: On the twenty-fourth day of February, in the year last aforesaid, it being the term of Court aforesaid, the following, among other proceedings, were had and entered of record in said Court, which said proceedings are in the words and figures following, to-wit:

No. 71236

Indictment for Kidnaping for Ransom.

The People of the State of Illinois,

vs.

Roger Tuohy otherwise called Roger Towhey
(Impleaded).

This day come the said People, by Thomas J. Courtney, State's Attorney, and the said Defendant as well in his own proper person as by his Counsel also comes, and now neither the said Defendant nor his Counsel for him saying anything further why the judgment of the Court should not now be pronounced against him on the verdict of guilty, heretofore rendered to the indictment in this cause.

Therefore, it is considered, ordered and adjudged by the Court that the said Defendant Roger Tuohy is guilty of the said crime of kidnaping for ransom in manner and form as charged in the indictment in this cause, and the said verdict of guilty, and that he be and is hereby sentenced to confinement at hard labor in the Illinois State Penitentiary for said crime of kidnaping for ransom in manner and form as charged in the indictment whereof he stands convicted and adjudged guilty, for the term of ninety-nine (99) years from and after the delivery of the body of the said Defendant Roger Tuohy to the Illinois State Penitentiary, and that the said Defendant Roger Tuohy be taken from the bar of the Court to the Common Jail of Cook County, from whence he came and from thence by the Sheriff of Cook County to the Department of Public Welfare and the said Department of Public Welfare is hereby required and commanded to take the body of the said Defendant Roger Tuohy and confine him in said Penitentiary, in safe and secure custody, for and during the term of ninety-nine (99) years, from and after the delivery thereof, at hard labor, and that he be thereafter discharged.

It Is Further Ordered that the said Defendant pay all the costs of these proceedings, and that execution issue therefor.

State of Illinois, }
County of Cook. } ss.

I, George Seif, Clerk of the Criminal Court of Cook County, in said County and State, do hereby certify the above and foregoing to be a true, perfect and complete copy of an order entered of Record in said Court, in the case of The People of the State of Illinois, versus Roger Tuohy.

Witness, George Seif, Clerk of said Court, and the Seal thereof, at Chicago, in said County, this twenty-fourth day of February A. D. 1934.

(Signed).^s George Seif,

(Seal)

Clerk.

To the Sheriff of Cook County to Execute.

99 Of the January Term of the Will County Circuit Court, in the year of our Lord One Thousand Nine Hundred Forty Three.

The Grand Jurors, chosen, selected and sworn, in and for the County of Will and State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that heretofore, to-wit, at a term of the Criminal Court of Cook County, in the State of Illinois, begun and held at the Criminal Court House, at the City of Chicago, within and for said County and State, on the first Monday in June in the year of our Lord One Thousand Nine Hundred Thirty Five, a Grand Jury was duly chosen, selected and sworn, in and for said County of Cook, and by said Grand Jury so chosen at said June Term of the Criminal Court of Cook County in the year of our Lord One Thousand Nine Hundred Thirty Five, one Edward Darlak by the name, style and description of "Edward Darlak otherwise called Edward Jacobson otherwise called Edward Darlack otherwise called Edward Gorlack otherwise called Edward Garlock" was indicted on a charge of Murder, alleged to have been committed upon one Thomas Kelma in said County and State on the thirty-first day of May in the year of our Lord One Thousand Nine Hundred Thirty Five; and said Grand Jury last aforesaid duly returned an indictment on said charge last aforesaid at the term last aforesaid, which said indictment was known as Number 76030 of said Court.

Whereupon such proceedings were had in due form of

law, that afterward, on, to-wit, the 18th day of June in the year of our Lord One Thousand Nine Hundred Thirty Five, it being the same term of said Court, as aforesaid, the said Edward Darlak was duly arraigned in said cause, and that subsequently, at and during the July Term of said Criminal Court of Cook County, County of Cook, State of Illinois, on, to-wit, the 16th day of July in the year of our Lord One Thousand Nine Hundred Thirty Five, the said Edward Darlak, upon being duly arraigned, entered a plea of guilty in said cause, and the plea of guilty in said cause by the said Edward Darlak having been received by the said Court, and the said Edward Darlak duly warned by the presiding judge thereof of the consequences of his plea, the said Edward Darlak persisted in the same, and said plea was thereupon entered of record in said Court in said cause; that subsequently, on, to-wit, the 26th day of July in the year of our Lord One Thousand Nine Hundred Thirty Five, it being the July Term of said Criminal Court of Cook County, County of Cook, State of Illinois, the said Edward Darlak, by the name, style and description of "Edward Darlak otherwise called Edward Jacobson otherwise called Edward Darlack otherwise called Edward Gorklack otherwise called Edward Garlack" was duly sentenced to the Illinois State Penitentiary for a term of One Hundred Ninety Nine (199) years, and on, to-wit, the said 26th day of July in the year of our Lord One Thousand Nine Hundred Thirty Five, being the July Term of said Court, it was then and there considered and adjudged by said Court, and then and there became the final judgment of said Court, that the said Edward Darlak was guilty of the said crime of Murder in manner and form as set forth in said indictment, and in said cause, and was thereby sentenced to confinement at hard labor in the Illinois State Penitentiary for the said crime of Murder as charged in said indictment in said cause, whereof he, the said Edward Darlak then and there stood convicted and adjudged guilty as aforesaid, for the term of One Hundred Ninety Nine (199) Years, from and after the delivery of the body of the said Edward Darlak to the Illinois State Penitentiary; that subsequently, on, to-wit, the 27th day of July in the year of our Lord One Thousand Nine Hundred Thirty Five, the Clerk of the Criminal Court of Cook County, County of Cook, State of Illinois, pursuant to the sentence and judgment of conviction of the said Edward Darlak, as aforesaid, lawfully, legally and duly issued a mittimus

in said cause, and that subsequently, on, to-wit, the 14th day of October in the year of our Lord One Thousand Nine Hundred Thirty Five, the said mittimus and the said Edward Darlak, were, by the Sheriff of the said County of Cook, State of Illinois, delivered to and received at the Illinois State Penitentiary, when and where the said Edward Darlak was committed to the said Illinois State Penitentiary for the term of One Hundred Ninety Nine (199) Years pursuant to the sentence and conviction of the said Edward Darlak and mittimus as aforesaid, and that the Warden of said Illinois State Penitentiary held and had custody of the said Edward Darlak, and he, the said Edward Darlak was a prisoner lawfully committed to and confined and detained in said Illinois State Penitentiary by reason and virtue of said mittimus issued pursuant to said sentence and conviction of the said Edward Darlak, as aforesaid, from on, to-wit, the said 14th day of October in the year of our Lord One Thousand Nine Hundred Thirty Five up to and including, to-wit, the 9th day of October in the year of our Lord One Thousand Nine Hundred Forty Two.

100 And the Grand Jurors Aforesaid, upon their oaths aforesaid, do further present: That one Roger Tuohy otherwise called Roger Towhey, one Hugh Basil Banghart otherwise called Larry Green, one William Stewart otherwise called William S. Stewart otherwise called William Brooks one Martlyck Nelson otherwise called Mathew Nelson otherwise called Martin Newton otherwise called Matt Norton late of the County of Will, State of Illinois, on, to-wit, the 9th day of October in the year of our Lord One Thousand Nine Hundred Forty Two, in the said County of Will, State of Illinois, aforesaid, did unlawfully, wilfully, knowingly and feloniously aid, abet and assist the said Edward Darlak, who was then and there a prisoner of and lawfully committed to and confined and detained in the Illinois State Penitentiary, which was then and there a penitentiary and prison situated in said County of Will, State of Illinois, for the term of One Hundred Ninety Nine (199) Years, by reason and virtue of and pursuant to the sentence and conviction of the said Edward Darlak by the said Criminal Court of Cook County, County of Cook, State of Illinois, as aforesaid, and the said mittimus issued pursuant thereto, as aforesaid, to escape from said Illinois State Penitentiary, which was then and there a peniten-

tiary and prison as aforesaid, contrary to the form of the Statute in such case made and provided and against the peace and dignity of the same People of the State of Illinois.

(Signed) James E. Burke,
State's Attorney in and for
the said County of Will.

State of Illinois, }
County of Will. } ss.

I Paul V. Wunder, Jr., Clerk of the Circuit Court of the County of Will in the State aforesaid, do hereby certify that the name of the Judge presiding at the trial of cause #9604 entitled The People of the State of Illinois vs. Roger Tuohy otherwise called Roger Towhey, Hugh Basil Banghart otherwise called Larry Green, William Stewart, otherwise called William S. Stewart otherwise called William Brooks, Martlick Nelson otherwise called Mathew Nelson otherwise called Martin Newton otherwise called Matt Norton is Honorable Roscoe C. South, and that his residence is at Watseka, Illinois; that the name of the Jurors who served in this cause and their respective residences are as follows, to-wit:

Catherine Thomas, 703 Oneida St., Joliet, Illinois
Joel Hebbard, 621 Marion St., Joliet, Illinois
Wm. Marshall, 813 Farragut Pl., Joliet, Illinois
Louise Manthie, 902 Center St., Joliet, Illinois
Ella Ice, 910 W. Park Ave., Joliet, Illinois
Agnes Upton, 119 Linden Ave., Joliet, Illinois
Jessie Christiansen, Caton Ave., Joliet, Illinois
Lillian Engleman, 101 Richards St., Joliet, Illinois
Mary Leggero, 509 S. Ottawa St., Joliet, Illinois
Helen Mosele, 622 W. 8th St., Lockport, Illinois
Thomas Burns, 309 Schorie Ave., Joliet, Illinois
Edith Metz, 4 Mississippi Ave., Joliet, Illinois

101 and that the names of the witnesses sworn at said trial and their respective residences are as follows, to-wit:

George Davis, Joliet, Illinois
Glenn D. Harris, 809 State St., Lockport, Illinois
Melvin Bere, Freeport, Illinois
William Dahler, 108 Nicholson St., Joliet, Illinois

Exhibit A.

Lt. George Robert Cotter, State Farm, R. #3, Lockport, Illinois
William B. Wilson, 468 N. Chicago St., Joliet, Illinois
Herman A. Kross, Winona, Illinois
Edward Darlak, State Penitentiary, Stateville
John Kirincich, Joliet, Illinois
Captain J. A. Dort, Joliet, Illinois
Joseph E. Ragen, Warden of Penitentiary, Joliet, Illinois
Sylvia Klett, 614 Cowles Ave., Joliet, Illinois
Asst. Warden Walter L. Moody, Joliet, Illinois
William S. Stewart, Stateville, Illinois
Matt Nelson, Stateville, Illinois
Capt. Homer Druin, Joliet, Illinois
Richard N. Hosteny, Asst. Special Agent F.B.I. Office
Samuel Johnson, Chicago, Illinois
Roger Tuohy, Stateville, Illinois
Doctor Matt Bloomfield, Joliet Illinois

I further certify that attached to this statement and made a part hereof is a true, perfect and complete copy of the indictment filed in said cause on February 19, 1943.

In Testimony Whereof, I have hereunto set my hand and the seal of said Court, at Joliet, this 3rd day of May, A. D. 1944.

(Signed) Paul V. Wunder, Jr.,
Clerk—Circuit Court, Will
Co., Illinois.

(Seal)

102 And afterwards on, to wit, the 8th day of November, 1948, came the Petitioner, Roger Touhy by his attorneys and filed in the Clerk's office of said Court his certain Amended Petition For Writ of Habeas Corpus, in words and figures following, to wit:

103 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-C-448) * *

AMENDED PETITION FOR WRIT OF HABEAS
CORPUS.

Comes now Roger Tuohy, petitioner herein by Robert B. Johnstone, his attorney, and leave of Court to file this amended petition having first been duly obtained, respectfully represents unto this Honorable Court that he is now unlawfully detained and deprived of his liberty, without due process of law and without his consent by respondent in the Illinois State Penitentiary at Stateville, Illinois, under alleged color of law by reason of judgment entered by the Criminal Court of Cook County, Illinois, on to-wit, the 24th day of February, 1934, in case No. 71236, by which petitioner was found guilty as charged in the indictment in said cause and sentenced to confinement at hard labor in the Illinois State Penitentiary, for a term of ninety-nine years.

Petitioner further represents that his detention is unlawful and in violation of his rights under the Constitution of the United States for the following reasons:

1. In the prosecution as a result of which he was sentenced as aforesaid, petitioner was unlawfully deprived
104 of the right to have compulsory process of obtaining witnesses in his favor and having the assistance of counsel for his defense in violation of his rights under Amendment VI to the Constitution of the United States.

2. Petitioner in said prosecution above referred to was deprived of his liberty without due process of law in violation of his rights under Amendment XIV to the Constitution of the United States in that the representatives of the State of Illinois in the premises conspired to and did bring about the conviction of petitioner for an alleged crime which he did not commit, by means of the procurement and production in the trial of said cause of perjured

testimony as to the connection of the petitioner with the alleged crime of kidnapping one John Factor, and conspired to and did intimidate witnesses who were in a position to testify to the lack of connection between petitioner and said crime of kidnapping, if any, and conspired to and did suppress evidence tending to show petitioner was not connected with or guilty of said crime.

3. In said prosecution petitioner was deprived of the right to a fair trial guaranteed to him by Amendment VI to the Constitution of the United States and Amendment XIV to said Constitution in that the trial judge in said cause forced petitioner to go to trial in an unreasonably short time, deprived petitioner's counsel of an opportunity to prepare and present petitioner's defense and deprived petitioner and his counsel of an opportunity to investigate and meet the perjured testimony including the testimony of one Isaac Kostner, upon the basis of which, at the instance and instigation of the representatives of the State, petitioner's wrongful conviction was obtained.

That said judgment of conviction above referred to is void and of no force and effect.

105 Petitioner further represents that he has exhausted all remedies available to him under the State law in the premises.

Wherefore, petitioner prays that a Writ of Habeas Corpus be issued by this Honorable Court directed to Joseph E. Ragen, Warden of the Illinois State Penitentiary, Stateville, Illinois, in his behalf, pursuant to the Statute in such cases made and provided and that petitioner may be brought forthwith before this Court to do, submit to and receive what the law may require and that he be discharged from custody and from the aforesaid illegal detention and imprisonment.

Roger Tuohy,

Petitioner,

By Robert B. Johnstone,

His Attorney.

Robert B. Johnstone,
Attorney for Petitioner,
30 N. LaSalle Street,
(FR 2 1516).

State of Illinois, {
County of Cook. } ss.

ST

Robert B. Johnstone, being first duly sworn on oath, deposes and says that he is Attorney for Roger Tuohy, petitioner above named; that he has read the said petition by him subscribed on behalf of said petitioner; and knows the contents thereof; that he has investigated into the matters therein referred to and interviewed prospective witnesses in connection with the same and that on the basis of the information derived as a result of such investigation, believes the matters and things therein set forth to be true.

Robert B. Johnstone.

Subscribed and sworn to before me this 8th day of November A. D., 1948.

Howard B. Bryant,
Notary Public.

(Seal)

Received a copy of the above and foregoing Amended Petition For Writ of Habeas Corpus this 8th day of November, A. D. 1948.

George F. Barrett,
Attorney General, Attorney for
Respondent.

106 And afterwards, to wit, on the 16th day of November, 1948, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

107 IN THE UNITED STATES DISTRICT COURT.

• • (Caption—48-C-448) • •

This cause this day coming on for hearing on the Petition for a Writ of Habeas Corpus come the parties to this suit by their attorneys, respectively and the hearing proceeds, the arguments of counsel are heard and on motion of the respondent it is

Ordered that section b of paragraph 3 of the respondent's motion to dismiss the Petition for a Writ of Habeas Corpus be and it is hereby stricken and the Court having now heard

the arguments of counsel and being fully advised in the premises it is

Ordered that the Motion of the respondent to dismiss the Petition for a Writ of Habeas Corpus be and it is hereby denied and that Writ of Habeas Corpus issue herein as prayed in the petition therefor, returnable on May 9, 1949, at 10:00 o'clock A. M., and that this cause be and it is hereby set for hearing on the Writ of Habeas Corpus on May 9, 1949, at 10:00 o'clock A. M.

108 And afterwards on, to wit, the 4th day of May, 1949 came the Respondent by his attorneys and filed in the Clerk's office of said Court his certain Return To Writ Of Habeas Issued Pursuant to Amended Petition, in words and figures following, to wit:

109 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-C-448) * *

RETURN TO WRIT OF HABEAS CORPUS ISSUED PURSUANT TO AMENDED PETITION.

In obedience to the writ of habeas corpus heretofore issued in the above entitled cause, and pursuant to Section 257 of Title 28, United States Code, I, Ben Schwartz, Assistant Attorney General of the State of Illinois, for and in behalf of Ivan A. Elliott, Attorney General of the State of Illinois, and chief law officer of said State, do hereby certify for and in behalf of the above named respondent, the true cause of the detention of the petitioner, Roger Touhy, by the respondent, Joseph E. Ragen, Warden of the Illinois State Penitentiary, and state that the true cause of such detention is as follows:

1. The relator, Roger Touhy, is in the custody of the respondent, Joseph E. Ragen, as Warden of the Illinois State Penitentiary, Joliet Branch, by virtue of two judgments of conviction, to-wit:

(a) a judgment of conviction entered in the Criminal Court of Cook County, Illinois, on February 24, 1934, whereby the relator was, upon indictment, arraignment, trial and finding of guilty by jury, convicted of the crime of kidnapping for ransom, and sentenced to imprisonment for a term of 99 years. A copy of the mitti-

mus wherein the judgment of the court is contained is hereto attached, marked Exhibit "A", and by reference thereto is incorporated herein.

(b) a judgment of conviction entered in the Circuit Court of Will County, Illinois, on the 30th of November, 1943, whereby the relator was, upon indictment, arraignment, trial and finding of guilty by a jury, convicted of the crime for aiding escape of a convicted prisoner, and sentenced to imprisonment for a term of 199 years. A copy of the mittimus wherein the judgment of the court is contained is hereto attached, marked Exhibit "B" and by reference thereto is incorporated herein.

2. The amended petition contains no allegation or makes any reference to relator's conviction for the crime of aiding in escape as aforementioned in paragraph 1 (b) ante. Said judgment has never been vacated, expunged or modified, nor has the relator prosecuted a writ of error to the Illinois Supreme Court to review the judgment of conviction. A common law writ of error can be applied for within 20 years. (*People v. Murphy*, 296 Ill. 532.)

A federal district court, therefore, is without jurisdiction to review issues raised in the relator's amended petition wherein said relator attacks only the validity of the judgment of conviction for kidnapping as aforementioned in paragraph 1 (a) ante, for the following reasons:

(a) the relator has failed to exhaust the remedies available to him under Illinois procedure to set aside the judgment of conviction for aiding in escape, to-wit: a writ of error to the Illinois Supreme Court. (*White v. Ragen*, 324 U. S. 760.)

(b) the judgment, never having been tested as to its validity in the state courts, is presumed to be valid. (*U. S. v. John L. Lewis*, 330 U. S. 258, 67 S. C. 677.)

(c) where there is another valid cause for restraint, the judgment thereon not being satisfied, the cause is moot regardless of the validity of the judgment under which, too, the relator is being held under restraint. (*Parker v. Ragen*, 167 Fed. (2) 792; *Touche v. Lainson*, 170 Fed. (2) 69; *Gryger v. Burke*, 334 U. S. 728, 68 S. Ct. 1256.)

3. Respondent further answering shows unto the Court the inconsistency of the allegations of the relator's amended petition. In paragraph 1 of said amended petition relator avers that he was denied compulsory process

of witnesses and ~~deprived of~~ having the assistance of counsel for his defense, whereas in paragraph 3 of said amended petition relator avers that the trial judge forced the relator to trial in an unreasonably short time thereby 112 depriving his counsel of an opportunity to meet the testimony of a state witness, an accomplice who allegedly gave perjured testimony.

Respondent shows unto the Court that the relator was first tried on the kidnapping charge on January 17, 1934, and that said trial lasted until February 2, 1934, at which time the jury was discharged for failure to arrive at a verdict. The new trial commenced on February 13, 1934. The relator was at all times represented by William Scott Stewart, an able and experienced lawyer in the defense of persons charged with crime. Mr. Stewart represented the relator on the first trial as counsel of relator's own choosing, and on the new trial by appointment of the court.

4. The allegations contained in paragraph 3 of the relator's amended petition, attacking only the validity of the judgment of conviction for kidnapping for ransom and his 99 year sentence thereunder, were raised in the Illinois Supreme Court upon writ of error, and upon a consideration of the full and complete transcript of the evidence taken at the trial, the judgment was affirmed. *People of the State of Illinois v. Roger Touhy*, Nos. 22789, 22864, reported in Volume 361 of the Illinois Reports at page 332 thereof.

5. The relator did not make an application for a writ of certiorari to the United States Supreme Court to review the affirmance of conviction by the Illinois Supreme Court. The relator, therefore, has failed to exhaust the remedies available to him to seek a determination of the errors assigned and considered by the highest court of the State of Illinois, and by reason thereof a federal district court is without jurisdiction to review the issues adjudicated. 113 (*White v. Ragen*, 324 U. S. 760; *U. S. ex rel. Rogalski v. Jackson*, 146 Fed. (2) 251.)

The questions thus adjudicated are settled by the affirmation of said judgment. (*Andrews v. Swartz*, 156 U. S. 272, S. Ct. 389.)

6. Notwithstanding the charges asserted in paragraph 2 of relator's amended petition, which allegations are vague, indefinite and a mere conclusion of the pleader, the respondent denies that perjury was committed, and spe-

cifically avers that no public officer knowingly caused to be introduced any false, perjurious or fabricated testimony or evidence against the relator on the trial for kidnapping.

7. Respondent further shows unto the court that the Criminal Court of Cook County had jurisdiction of the person and of the subject matter (kidnapping for ransom) and that the relator was lawfully convicted and lawfully sentenced, and that the relator is lawfully in his custody by virtue of the judgments of conviction as aforementioned in paragraph 1, ante.

8. The relator has not served the maximum of his sentences.

Wherefore, your respondent having fully answered and shown unto the Court the true cause of the detention of the relator says that by reason thereof the writ of habeas corpus heretofore issued should be quashed, the petition for writ of habeas corpus should be dismissed, and that this Court by its order should remand the relator to the custody of the respondent.

114

Joseph E. Ragen,
Warden Illinois State Penitentiary, Joliet, Illinois.

Ben Schwartz,
Assistant Attorney General for
Ivan A. Elliott, Attorney General of the State of Illinois,
Attorney for the Respondent, Joseph E. Ragen.

John S. Boyle,
State's Attorney,
Cook County,
Illinois.

208 S. LaSalle St.,
Chicago 4, Illinois.
RAndolph 6-8600.

115 State of Illinois, }
County of Cook. } ss.

Affidavit.

Ben Schwartz, being first duly sworn on oath deposes and says that he has read the foregoing return of respondent by him subscribed; that the information upon which the return is based was furnished to him by public officials of the State of Illinois, and that he believes the same to be true; that the documents appended hereto as exhibits have been furnished to him by public officials of the State of Illinois, and that he believes the same to be true and correct copies of the original documents.

Ben Schwartz.

Subscribed and sworn to before me this 3rd day of May,
A. D. 1949.

(Seal)

Dorothy M. Enright,
Notary Public.

116 State of Illinois, }
County of Cook. } ss.

Proof of Service.

William K. Bertling, being first duly sworn on oath deposes and says that he served a true and correct copy of the foregoing return of respondent as required under the rules of this court by personally serving the same upon the relator's attorney, Robert B. Johnstone Suite 1307, 30 N. LaSalle Street, Chicago, Illinois, by taking a duplicate copy of said return personally to the office of the relator's attorney aforesaid and depositing the same in his said office located at 30 N. LaSalle Street, Suite 1307, Chicago, Illinois, on the 3rd day of May, A. D. 1949.

William K. Bertling.

Subscribed And Sworn to before me this 3rd day of May,
A. D. 1949.

(Seal)

Dorothy M. Enright,
Notary Public.

117

EXHIBIT "A".

State of Illinois, }
 County of Cook. } ss.

Pleas, before a Branch of the Criminal Court of Cook County, in said County and State, at a term thereof begun and held at the Criminal Court House, in the City of Chicago, in said County, on the first Monday (being the fifth day) of February, in the year of our Lord one thousand nine hundred and thirty-four and of the Independence of the United States the one hundred and fifty-eighth.

Present:

Honorable Michael Feinberg, Judge of the Circuit Court of Cook County, and Ex-Officio Judge of the Criminal Court of Cook County.

Thomas J. Courtney, State's Attorney.

Attest: George Seif, Clerk. Wm. D. Meyering, Sheriff of Cook County.

Be It Remembèred, to-wit: On the twenty-fourth day of February in the year last aforesaid, it being the term of Court aforesaid, the following, among other proceedings, were had and entered of record in said Court, which said proceedings are in the words and figures following, to-wit:

The People of the State of Illinois, No. 71236 vs. Roger Tuohy, otherwise called • Roger Towhey (Impleaded)	} Indictment for Kidnapping for Ransom.
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This day come the said People, by Thomas J. Courtney, State's Attorney, and the said Defendant as well in his own proper person as by his Counsel also comes, and now neither the said Defendant nor his Counsel for him saying anything further why the judgment of the Court should not now be pronounced against him on the verdict of guilty, heretofore rendered to the indictment in this cause.

Therefore, it is considered, ordered and adjudged by the Court that the said Defendant, Roger Tuohy is guilty of the said crime of kidnapping for ransom in manner and

form as charged in the indictment in this cause, and the said verdict of guilty, and that he be and is hereby sentenced to confinement at hard labor in the Illinois State Penitentiary for said crime of Kidnapping for ransom in manner and form as charged in the indictment whereof he stands convicted and adjudged guilty, for the term of nine nine (99) years from and after the delivery of the body of the said Defendant, Roger Tuohy, to the Illinois State Penitentiary, and that the said Defendant, Roger Tuohy, be taken from the bar of the Court to the Common Jail of Cook County, from when he came and from thence by the Sheriff of Cook County to the Department of Public Welfare and the said Department of Public Welfare is hereby required and commanded to take the body of the said Defendant, Roger Tuohy, and confine him in said Penitentiary, in safe and secure custody, for and during the term of ninety-nine (99) years, from and after the delivery thereof, at hard labor, and that he be thereafter discharged.

It Is Further Ordered that the said Defendant pay all the cost of these proceedings, and that execution issue therefor.

State of Illinois, }
County of Cook. } ss.

I, George Seif, Clerk of the Criminal Court of Cook County, in said County and State, do hereby certify the above and foregoing to be a true, perfect and complete copy of an order entered of Record in said Court, in the case of The People of the State of Illinois, *versus* Roger Tuohy.

Witness George Seif, Clerk of said Court, and the Seal thereof, at Chicago, in said County, this twenty-fourth day of February, A. D. 1934.

To the Sheriff of Cook County to Execute.
(Seal)

(Signed) George Seif,
Clerk.

118

EXHIBIT "B".

UNITED STATES OF AMERICA, }
State of Illinois, } ss.
County of Will.

At a Circuit Court in the Twelfth Judicial Circuit of the State of Illinois, begun and held at the Court House, in Joliet, within and for the County of Will, on the third Monday of November (the same being the fifteenth day of said Month), in the year of our Lord, one thousand nine hundred and forty-three, and of the independence of the United States the one hundred and sixty-eighth.

Present:

Honorable James V. Bartley, one of the Judges of said Circuit presiding.

Paul V. Wunder, Jr., Clerk of said Court.

James E. Burke, State's Attorney of said County, and

Ralph H. Newkirk, Sheriff of said County.

Attest: Paul V. Wunder, Jr., Clerk.

Court Opened by Proclamation of Sheriff.

Be It Remembered, That afterward, to-wit: On the 30th day of November in the year last aforesaid, it being one of the regular days of the term of court aforesaid, the following among the proceedings were had and entered of record in said Court, before the Honorable Roscoe G. South, one of the Judges of said Circuit, presiding, which proceedings were in the words and figures following, to-wit:

The People of the State of Illinois,
No. 9604 vs.

Roger Tuohy otherwise called Roger Towhey, Hugh Basil Banghart otherwise called Larry Green, William Stewart, otherwise called William S. Stewart otherwise called William Brooks, Martlick Nelson otherwise called Mathew Nelson otherwise called Martin Newton otherwise called Matt Norton.

Indictment for Aiding Escape, etc.

This Day come the said People, by James E. Burke, State's Attorney, and the said Defendants Roger Tuohy

otherwise called Roger Towhey, William Stewart otherwise called William S. Stewart, otherwise called William Brooks, and Martlick Nelson otherwise called Mathew Nelson otherwise called Martin Newton otherwise called Matt Norton, in their own proper persons also come in pursuance of the Writ of Habeas Corpus heretofore issued herein, and also comes Irving S. Roth, attorney for Roger Tuohy otherwise called Roger Towhey and Charles M. Itobson and F. Donald Delaney, attorneys for William Stewart otherwise called William S. Stewart otherwise called William Brooks, and Martlick Nelson otherwise called Mathew Nelson otherwise called Martin Newton otherwise called Matt Norton.

And the briefs of all parties having been heretofore filed and considered by the Court, pursuant to advisement, it is now ordered by the Court that the defendants motions for a new trial of this cause be and are now denied.

Whereupon each defendant is given an opportunity to state why sentence should not be pronounced upon him, and said statements are thereupon made.

After which neither defendants nor their counsel for them saying anything further why the judgment and sentence of this Court should not now be pronounced against them on the verdict of guilty heretofore rendered by the jury to the indictment in this cause.

Therefore, pursuant to the verdict of the jury finding the said defendant Roger Tuohy otherwise called Roger Towhey guilty of crime of Aiding Escape, etc., in manner and form as charged in the indictment in this cause, the judgment and sentence of this Court, is that the said defendant Roger Touhy otherwise called Roger Towhey be taken from the bar of this Court and returned to the Illinois State Penitentiary from whence he came, and be delivered to the Warden or Keeper of said Penitentiary and the said Warden or Keeper is hereby required and commanded to take the body of said defendant Roger Touhy otherwise called Roger Towhey and confine him in said Illinois State Penitentiary in safe and secure custody for and during the term of 199 years from and after delivery hereof, and according to law, and that he be thereafter discharged.

Therefore, pursuant to the verdict of the jury finding the said defendant William Stewart, otherwise called William S. Stewart, otherwise called William Brooks guilty of crime of Aiding Escape, etc., in manner and form as

charged in the indictment in this cause, the judgment and sentence of this Court, is that the said defendant William Stewart, otherwise called William S. Stewart otherwise called William Brooks be taken from the bar of the Court and returned to the Illinois State Penitentiary from whence he came and be delivered to the Warden or Keeper 119 of said Penitentiary (photostat not legible) William

Brooks and confine him in said Illinois State Penitentiary in safe and secure custody for and during the term of 199 years from and after delivery hereof, and according to law, and that he be thereafter discharged.

Therefore, pursuant to the verdict of the jury finding the said defendant Martlick Nelson otherwise called Mathew Nelson otherwise called Martin Newton otherwise called Matt Norton guilty of crime of Aiding Escape, etc., in manner and form as charged in the indictment in this cause, the judgment and sentence of this Court is that the said defendant Martlick Nelson otherwise called Mathew Nelson otherwise called Martin Newton otherwise called Matt Norton be taken from the bar of this Court and returned to the Illinois State Penitentiary from whence he came, and be delivered to the Warden or Keeper of said Penitentiary and the said Warden or Keeper is hereby required and commanded to take the body of said Defendant Martlick Nelson otherwise called Mathew Nelson otherwise called Martin Newton otherwise called Matt Norton and confine him in said Illinois State Penitentiary in safe and secure custody for and during the term of 199 years from and after delivery hereof, and according to law, and that he be thereafter discharged.

It Is Further Ordered and Adjudged that the said Defendant pay the costs of this prosecution and that execution issue therefor.

State of Illinois, }
Will County. } ss.

I, Paul V. Wunder, Jr., Clerk of the Circuit Court of the County of Will in the State aforesaid, and Keeper of the records and files of said Court, do hereby certify that the above and foregoing is a true copy of the final judgment and sentence entered of record in said Court in the case of the People of the State of Illinois *versus* Roger Touhy otherwise called Roger Towhey, William Stewart, otherwise called William S. Stewart otherwise called William Brooks, Martlick Nelson otherwise called Mathew Nelson otherwise called Martin Newton otherwise called Matt Norton as the same appears from the records of said Court now in my custody.

In Testimony Whereof, I have hereunto set my hand and the seal of said Court, at Joliet, this 3rd day of May, A. D. 1944.

/s/ Paul V. Wunder, Jr.,
Clerk.

To the Sheriff of Will County to Execute.

120 And afterwards on, to wit, the 13th day of May, 1949, came the Petitioner, Roger Touhy by his attorneys and filed in the Clerk's office of said Court his certain Traverse to Return to Writ of Habeas Corpus in words and figures following, to wit:

121 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—48-C-448) • •

TRAVERSE TO RETURN TO WRIT OF HABEAS CORPUS.

Comes now Roger Touhy, Petitioner, by Robert B. Johnstone, his attorney, and pursuant to leave of Court, files this his Traverse to the Writ heretofore filed in this cause to the Writ of Habeas Corpus heretofore issued in this cause and Traverse, and denies each and every allegation in said Writ contained, and further shows the Court:

1. That the purported judgment of conviction entered

in the Criminal Court of Cook County, Illinois, on February 24, 1934, was and is void and of no force and effect for the reasons set forth in the Amended Petition for a Writ of Habeas Corpus heretofore filed herein.

2. That the purported judgment of conviction entered in the Circuit Court of Will County, Illinois, on the 30th day of November 1943, referred to in paragraph 1 (b) of said Writ, was and is void and of no force and effect, among other reasons, because the purported Statute under which the proceedings had against Petitioner, upon which said judgment of conviction was based, namely, Chapter 38, Illinois Revised Statutes, Section 228, Criminal Code, State of Illinois, Paragraph 92, was at the time of said proceedings and of said conviction, and is now void and of no force and effect, and was and is violative of the Constitution of the United States and of the State of Illinois and the Amendments thereto, including among other provisions specifically, Amendments 5, 6, 8, 9, and 14 to the Constitution of the United States, and Article 2, Sections 7 and 11 of the Constitution of the State of Illinois, and said Statute and the proceedings had thereunder were in violation of Petitioner's rights under said Constitutions and the Amendments thereto, including the specific provisions mentioned above.

3. This Petitioner has a right to question the constitutionality of a Statute of the State of Illinois by the enforcement of which he is or may be affected by at any time in this Court without regard to other available remedies.

4. Petitioner had and has no available State Court processes under which the abridgment of his constitutional rights herein complained of could have been effectively protected.

5. Petitioner has exhausted all state remedies available effectively to protect his rights in the premises.

6. There exists in the Courts and judicial processes of the State of Illinois, a prejudice against Petitioner and others similarly situated as a result of which all purported remedies for the protection of constitutional rights in the Courts of said state are a sham and a pretense, and the action of said Courts in connection with all such proceedings affecting Petitioner and others similarly situated is now and has been for many years last past, arbitrary, capricious, and entirely lacking in regard for the consti-

tutional rights of Petitioner and of any and all persons convicted of crimes, and particularly your Petitioner whose conviction was brought about wrongfully through improper conduct of responsible State and County law enforcement officials.

124 7. Petitioner now, and has, at all material times herein, been without funds essential to any attempted remedies offered by the Statutes on the Common Law of the State of Illinois, and has exhausted all such remedies that it has been within his power and ability to pursue.

Wherefore Petitioner prays that he be discharged from custody and from the illegal detention and imprisonment under which he has been wrongfully held by Respondent.

Roger Touhy,

Petitioner.

By Robert B. Johnstone,

His Attorney.

Robert B. Johnstone,
30 N. La Salle St.,
Chicago, Illinois.
FR 2—1516.

State of Illinois, }
County of Cook. } ss.

Robert B. Johnstone, being first duly sworn, on oath deposes and says that he served a copy of the above Traverse upon Ivan A. Elliott, Attorney General of the State of Illinois, 208 S. La Salle Street, Chicago, Illinois, and John S. Boyle, States Attorney of Cook County, Illinois, Criminal Court Building, 26th and California, Chicago, Illinois, attorneys for the Respondent in the above cause, by mailing copies of the same, enclosed in envelopes duly stamped and addressed to said parties at the addresses herein shown, and depositing the same in the United States mail chute at 30 N. La Salle Street, Chicago, Illinois on May 13, 1949, at 4:15 o'clock P. M.

Robert B. Johnstone.

Subscribed and Sworn to before me this 13th day of May, 1949.

(Seal)

Eloise Proemmel,
Notary Public.

125 And afterwards on, to wit, the 17th day of May, 1949, came the Petitioner, Roger Touhy, by his attorneys and filed in the Clerk's office of said Court his certain Amended Traverse to Return to Writ of Habeas Corpus in words and figures following, to wit:

126 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-C-448) * *

AMENDED TRAVERSE TO RETURN TO WRIT OF
HABEAS CORPUS.

Comes now Roger Touhy, Petitioner, by Robert B. Johnstone, his attorney, and pursuant to leave of Court, files this his Traverse to the Return heretofore filed, in this cause to the Writ of Habeas Corpus heretofore issued in this cause and Traverse, and denies each and every allegation in said Return contained, and further shows the Court:

1. That the purported judgment of conviction entered in the Criminal Court of Cook County, Illinois, on February 24, 1934, was and is void and of no force and effect for the reasons set forth in the Amended Petition for a Writ of Habeas Corpus heretofore filed herein, the allegations of which said Amended Petition are expressly incorporated herein.

127 2. That the purported judgment of conviction entered in the Circuit Court of Will County, Illinois, on the 30th day of November 1943, referred to in paragraph 1 (b) of said Writ, was and is void and of no force and effect, among other reasons, because the purported Statute under which the proceedings had against Petitioner, upon which said judgment of conviction was based, namely, Chapter 38, Illinois Revised Statutes, Section 228, Criminal Code, State of Illinois, Paragraph 92, was at the time of said proceedings and of said conviction, and is now null, void and of no force and effect, and was and is in violation of the Constitution of the United States and of the State of Illinois and the Amendments thereto, including among other provisions specifically, Amendments V, VI, VIII, IX, and XIV to the Constitution of the United States, and Article II, Sections 7 and 11 of the Constitution of the State of Illinois, and said Statute and the proceedings had thereunder were in violation of Petitioner's rights

under said Constitutions and the Amendments thereto, including the specific provisions mentioned above.

3. This Petitioner has a right to question the constitutionality of a Statute of the State of Illinois by the enforcement of which he is or may be affected at any time in this Court without regard to other available remedies.

4. Petitioner had and has no available State Court remedies or processes under which the abridgment of his constitutional rights herein complained of could have been effectively protected.

5. Petitioner has exhausted all state remedies available effectively to protect his rights in the premises.

6. There exists in the Courts and judicial processes of the State of Illinois, a prejudice against Petitioner and others similarly situated as a result of which all purported remedies for the protection of constitutional rights in the Courts of said State are a sham and a pretense, and the action of said Courts in connection with all such proceedings affecting Petitioner and others similarly situated, is now and has been for many years last past, arbitrary, capricious, and entirely lacking in regard for the constitutional rights of Petitioner and of any and all persons convicted of crimes, and particularly your Petitioner whose conviction was brought about wrongfully through improper conduct of responsible State and County law enforcement officials.

129 7. Petitioner now, is and has, at all material times herein, been without funds essential to attempt to prosecute any purported remedies afforded by the Statutes or the Common Law of the State of Illinois, and has exhausted all such remedies that it has been within his power and ability to pursue.

Wherefore Petitioner prays that he be discharged from custody and from the illegal detention and imprisonment under which he has been wrongfully held by Respondent.

Roger Touhy,
Petitioner,

By Robert B. Johnstone,
His Attorney.

Robert B. Johnstone,
30 N. La Salle St.,
Chicago, Illinois.
FR 2—1516.

130 And afterwards on, to wit, the 31st day of May, 1949, came the Petitioner, Roger Touhy by his attorneys and filed in the Clerk's office of said Court his certain Amendment to Amended Petition for Writ of Habeas Corpus and to Amended Traverse in words and figures following, to wit:

131 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—48-C-448) * *

AMENDMENT TO AMENDED PETITION FOR WRIT OF HABEAS CORPUS AND TO AMENDED TRAVERSE:

Comes now Roger Touhy, petitioner, by Robert B. Johnstone, his attorney, and pursuant to leave of Court first had and obtained amends his amended petition for a writ of habeas corpus heretofore filed in this cause and also amends his amended traverse to the writ of habeas corpus heretofore issued by including in each of said pleadings the following additional paragraphs, Nos. 2A and 2B, respectively:

"2A. That on to-wit, June 25, 1933, one John Factor, also known as Jake the Barber, Walter A. Hendrichsen, also known as Buck Hendrichsen, Joe Silvers, Albert Kator, Peter Stevens, Ice Conners, James Tribbles and others agreed and pursuant to such agreement and understanding combined and conspired together in whole or in part to avoid, by means of staging a pretended kidnapping for ransome of said Factor, the extradition of said Factor to the Kingdom of Great Britain and Ireland pursuant to the provisions of certain treaties between the United
132 States and said Kingdom in connection with which said extradition a proceeding was pending in the Supreme Court of the United States upon a petition for writ of habeas corpus, originally filed by said Factor in the District Court of United States for the Northern District of Illinois, Eastern Division as cause No. 40323 in said Court, in which the United States marshal for said District and Division was respondent and had detained said Factor under a certain mittimus theretofore issued by Edward K. Walker, Esq., a United States Commissioner in a certain proceeding instituted by Godfrey Haggard, Coun-

sel General of the Kingdom of Great Britain, on behalf of said Kingdom under color of a treaty between the United States of America and said Kingdom, and to influence the public press, radio and other vehicles of information in the hope of affecting the result of said proceedings and of influencing officials of the Department of State of the United States and other agencies and officials that might or could be instrumental in enabling said Factor to avoid extradition to said Kingdom under said treaty; that in pursuance of said conspiracy and combination said conspirators, in whole or in part, committed one or more of the following among other overt acts:

1. On the night of June 30th-July 1st, 1933, staged a pretended kidnapping of said Factor at a certain roadhouse and gambling resort known as the Dells in Morton Grove, Illinois.

2. Arranged for said Factor to remain in concealment from June 30, 1933 to July 12, 1933, and aided and abetted said Factor in said concealment, and aided and abetted in the commission of perjury in connection therewith at the trial of petitioner on indictment No. 71236 in the Criminal Court of Cook County, Illinois.

3. Employed and engaged the services of divers agents in and about the carrying out of said conspiracy, including one Edward Schwabauer and one Clara Sezech, and others.

4. That thereafter and until subsequently to the purported conviction of petitioner in cause No. 71236 in the Criminal Court of Cook County, Illinois, said conspirators concealed and kept silent with respect to the true facts as to said alleged kidnapping and gave false testimony or committed perjury or aided and abetted in the giving of false testimony or the commission of perjury in connection with the trials of petitioner upon said indictment.

"2B. On, to-wit, July 1, 1933, and on divers dates before and afterwards, the Honorable Thomas J. Courtney at that time States Attorney of Cook County, Illinois, and Daniel Gilbert, Chief Investigator for said States Attorney and Chief of said States Attorney's police, and others, learned and became cognizant of the object of said combination and conspiracy in paragraph 2A hereof referred to, and thereafter said Courtney and said Gilbert and said Factor and others, including agents of the Department of Justice of the United States, agreed and pursuant to such agreement and understanding combined and

conspired together in whole or in part to procure the conviction of petitioner without regard to his guilt or innocence of the aforesaid alleged kidnapping of said Factor or of the kidnapping of one William Hamm, Jr., who had theretofore been kidnapped for ransom by one Alvin Karpis and others or of both said alleged crimes, and to that end to use the officers, personnel and agents and also the prestige and influence of the public office of the States Attorney of Cook County, Illinois, the police of the City of Chicago, Illinois, the agents of the Federal Bureau of Investigation and other attorney's agents and servants of the United States, the State of Illinois, the County of Cook and the City of Chicago, and in pursuance of said conspiracy and combination or in furtherance of the object of the conspiracy in paragraph 2A hereof referred to, or both, said conspirators in whole or in part, and acting in concert, committed one or more of the following among other overt acts:

1. Made repeated public announcements, charging petitioner with guilt for said pretended kidnapping of said Factor and said kidnapping of said Hamm on July 1, 1933, and divers dates thereafter.

2. Maneuvered the presentation of facts with respect to petitioner to the Grand Jury of Cook County, Illinois, and the publication as to indictment voted by said Grand Jury so that the resultant publicity might adversely affect the interests of petitioner in connection with his trial for the kidnapping of said Hamm.

3. Procured and caused to testify falsely in the United States District Court in St. Paul, Minnesota, one Walter Bowick, a spurious witness to petitioner's alleged participation in the kidnapping of said William Hamm, Jr.

135 4. Arranged to have said Factor take one secret trip to St. Paul, Minnesota, for the purpose of viewing petitioner, thus affording said Factor the basis for subsequent false or perjured testimony and for another widely publicized trip by said Factor from Chicago to the scene of said trial for the purpose of influencing the result thereof by creating the appearance of an apparent connection between petitioner and the alleged kidnapping of said Factor.

5. Caused the Honorable Thomas J. Courtney to intercede with the State Department of the United States and others and to exercise the influence of his office as States Attorney of Cook County, Illinois, to obtain delays in the extradition of said Factor and finally to effectuate or to

aid in effectuating the object of said combination and conspiracy in paragraph 2A hereof referred to.

6. Exerted influence to prevent witnesses favorable to petitioner from testifying for petitioner in the proceedings on indictment No. 71236 in Cook County, Illinois.

7. Prevented or attempted to prevent witnesses favorable to petitioner from testifying in said trial at St. Paul, Minnesota, and at each of the trials of petitioner under indictment No. 71236 in the Criminal Court of Cook County, Illinois by threats, intimidation and otherwise, and threatened and caused to be instituted reprisals against witnesses who did testify favorably to petitioner at said trials.

8. Obtained and assisted in the procurement by promises of favorable action by Government authorities the 136 false and perjured testimony of a spurious witness, one Isaac Costner and others and aided in and abetted the presentation of other false or perjured testimony in the trial of petitioner on indictment No. 71236 in the Criminal Court of Cook County, Illinois, in February 1934."

Roger Touhy,

Petitioner,

By Robert B. Johnstone,
His Attorney.

Robert B. Johnstone,
30 No. La Salle Street,
Fra. 2—1516.

State of Illinois, }
County of Cook. } ss.

Robert B. Johnstone, being first duly sworn on oath, deposes and says that he has read the above and foregoing amendment by him subscribed as attorney for Roger Touhy, Petitioner, and that he knows the contents thereof and that he has personally examined witnesses to the facts therein alleged and the testimony of other witnesses under oath, by deposition or otherwise, and that he believes on the basis of the information obtained from these sources and contemporaneous newspaper accounts that the matters of fact above stated are true.

Robert B. Johnstone.

Subscribed and sworn to before me this 30th day of May,
A. D. 1949.

(Seal)

Howard B. Bryant,
Notary Public.

137 And afterwards on, to wit, the 1st day of June, 1949, there was filed in the Clerk's office of said Court a certain Subpoena Duces Tecum in words and figures following, to wit:

138 Subpoena Duces Tecum.

Case No.

DISTRICT COURT OF THE UNITED STATES OF AMERICA.

Northern District of Illinois.

The President of the United States of America to George B. McSwain, Agent in Charge—Hon. Tom C. Clark, Federal Bureau of Investigation, Bankers Building, Chicago, Illinois, c/o Otto Kerner, Jr., United States Attorney—Greeting:

We Command You, that all business and excuses being laid aside, you and each of you attend before the Honorable John P. Barnes, one of the Judges of the District Court of the United States for said District, on the 31st day of May, A. D. 1949, at 10:00 o'clock in the forenoon in Room 653 United States Court House in Chicago, in said District, to testify and give evidence in a certain cause now pending and undetermined in said Court, wherein U. S. ex rel. Roger Touhy is Plaintiff and Joseph E. Ragen, Warden, Defendant, on the part of said And that you also diligently and carefully search for, examine, and inquire after and bring with you, and produce at the time and place aforesaid, a certain records of investigation made and statements of witnesses taken and procured in connection with the alleged kidnapping of John (Jake The Barber) Factor in and about Chicago, Cook County, Illinois in the months of July and August, 1933, including, specifically transcript, records, memoranda, and other data with respect to certain show ups held in the offices of the Federal Bureau of Investigation, Chicago, Illinois, on or between the dates of July 19 to July 24, 1933, inclusive, together with all copies, drafts, and vouchers relating to the said documents, and all other documents, letters, and paper writings whatsoever, that can or may afford any information or evidence in said cause. And this you shall in nowise omit, under the penalty of the law in that case made and provided.

To the Marshall of the Northern District of Illinois to execute and return in due form of law.

Witness, the Honorable John P. Barnes, Judge of the said Court, at Chicago, in said District, this 13th day of May, in the year of our Lord one thousand nine hundred and Forty Nine, and of the Independence of the United States of America the 173 year.

(Seal)

Roy H. Johnson,
Clerk.

139 And afterwards on, to wit, the 7th day of June, 1949 there was filed in the Clerk's office of said Court a certain Transcript of Proceedings Had Before Honorable John P. Barnes, Judge, in words and figures following, to wit:

141 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-C-448) * *

TRANSCRIPT OF CERTAIN PROCEEDINGS.

(more particularly with relation to a subpoena duces tecum directed to "George B. McSwain, Agent in Charge, Federal Bureau of Investigation, Chicago, Illinois") had in the above-entitled cause before the Honorable John P. Barnes, one of the Judges of said Court, in his court room in the United States Court House at Chicago, Illinois, beginning on June 1, 1949, a 10:00 o'clock a. m.

Present:

Robert B. Johnstone, Esq., Howard B. Bryant, Esq., and other Counsel, on behalf of the Relator.

142 Hon. Ivan A. Elliott, Attorney General of the State of Illinois, represented by Robert C. Eardley, Esq., and Ben Schwartz, Esq., Assistant Attorneys General; and Hon. John S. Boyle, State's Attorney of Cook County, Illinois, represented by James V. Cunningham, Esq., Assistant State's Attorney, on behalf of respondent.

Hon. Otto Kerner, Jr., United States District Attorney, John P. Lulinski, Esq., and Anthony Scariano, Esq., Assistant United States District Attorneys, on behalf of the Government.

143 And thereupon the following among other proceedings were had herein:—

(This is not a complete transcript of all the proceedings had in the above-entitled cause, this transcript being limited to certain proceedings concerning a subpoena duces tecum directed to "George B. McSwain, Agent in Charge, Federal Bureau of Investigation, Chicago, Illinois.")

144 By the Court: Call your first witness.

By Mr. Johnstone: If the Court please, I have issued a subpoena duces tecum directed to George B. McSwain, the head of the Federal Bureau of Investigation here. And I have talked with Mr. Kerner about the matter, and I would like to call Mr. Kerner, or his assistant as my first witness.

By the Court. Very well.

By Mr. Johnstone: If the Court please, may I file with the Clerk here the subpoena duces tecum, which was served by me personally upon Mr. McSwain, and upon Mr. Kerner as a representative of the Department of Justice in this proceeding?

By the Court: Yes, it may be filed.

By Mr. Johnstone: Mr. Kerner, have you produced the documents requested by that subpoena?

By Mr. Kerner: We have not produced the documents requested by the subpoena, in compliance with Department of Justice Order No. 3229, and also by Supplement No. 2 dated June 6, 1947.

Upon receiving this subpoena I wrote to the Attorney General in compliance with this order, and stated the facts of the subpoena.

And on May 25, 1949, I received this reply from the Attorney General, signed by Alexander M. Campbell, Assistant Attorney General, and head of the Criminal Division: (Reading.)

"May 25, 1949.

"Otto Kerner, Jr., Esquire,
United States Attorney,
450 United States Court House,
Chicago, Illinois.

Dear Mr. Kerner:

"Re: Roger Touhy (U. S. ex rel.) v. Ragan; D. C. No. 48 C 448; U. S. D. C. N. D., Ill. Your reference AS/ab.

"This acknowledges your letter of May 20, 1949, relative to the matter mentioned above. The Criminal Division has also received a letter from Attorney Robert B. Johnston who represents Roger Touhy in which he advises that he is going to subpoena certain FBI records.

It is the Department's position that it should decline to produce the records in question. It is desired, therefore, that you proceed in accordance with the instructions given in Supplement No. 2 of Order No. 3229. It is requested that you or one of your assistants be present at the hearing on May 31, 1949, in order to represent 146 Special Agent McSwain.

"Mr. Johnstone is being informed by letter from this Division with respect to the Department's position in this matter.

"It will be appreciated if you will keep us advised of developments in this case.

Respectfully,

For the Attorney General

Alexander M. Campbell,

Assistant Attorney General.

147 By Mr. Johnstone: If the Court please, I don't want to get away from the purposes of this lawsuit and engage in any controversy with the Department of Justice with respect to these records.

However, I do feel—and I feel that it is substantiated and no other Department of the Government has the right by the authorities, that the Department of Justice and no other Department of the Government has the right to issue a blanket refusal to produce documents.

I believe the law to be that in the event there is a question of security involved, or some reason which can

be made apparent to the Court, for not requiring the Government^a to produce the documents, then it is up to the Court to determine whether or not those should be produced.

I have had prepared a brief memorandum on this, and I do not want to unduly lengthen it, but there are cases both ways. And it seems to me from my examination of it that there must be authority in cases where constitutional rights are involved, that a tribunal other than the agency which itself may be affected by the proceeding does have the right to pass upon whether the records in question are of the type that some national interest or some other interest should outweigh the right of a 148 party litigant to all information in connection with this case.

That is the simple point. And Dean Wigmore has written a very vehement argument to the effect that that is the proper rule, that the Court must have the right to inspect and determine whether or not as to the particular documents the Executive Branch of the Government should be required to produce them.

The statute of course provides that the Attorney General may make regulations, which must be reasonable regulations. But the Court must determine the applicability in any particular case as to whether or not the production or non-production of the particular documents called for is for the best interests of the country as a whole.

By Mr. Kerner: May I make a statement, if the Court please?

By the Court: Yes.

By Mr. Kerner: Since I have been in office the last two years there have been three occasions upon which I have been served with subpoenas to produce records before the courts.

In each case where no public interest would be vitally 149 concerned, I have been instructed to produce the records.

In this case the Department of Justice feels that it would serve no public interest, but as a matter of fact might damage individuals if these records were produced at this time. And that was the reason for the ruling of the Attorney General in accordance with this Order No. 3229.

And it is not a matter which has been done without any discretion at all. It has been looked at with the thought in

mind: Will it help in any way? Will it damage anyone? Will it hurt someone?

By the Court: Well, I don't know what has been asked for.

I do not know except in the most general way what the Regulations of the Department may be. I am willing to assume that the determinations of the Department of Justice heretofore have been correct. But I will have to have something more before me now to determine whether the determination of the Department of Justice is correct in this particular instance. So you will have to advise me further, Gentlemen.

By Mr. Johnstone: Will the Court examine the subpoena? I don't want to, but I can call Mr. McSwain to the stand and ask him questions. But I believe that the 150 subpoena speaks for itself.

And I am asking that the documents specifically referred to in that subpoena be produced in response to it.

(Handing document to the Court.)

By the Court: I have read this.

I do not know what the regulations are.

By Mr. Kerner: Order No. 3229 reads as follows—

By the Court: We might as well make a record on this so that whatever the Court's decision is may be reviewed by the party that believes itself aggrieved by the determination, whatever it may be.

This subpoena calls upon Mr. "George B. McSwain, Agent in Charge," to produce here

"certain records of investigation made and statements of witnesses taken and procured in connection with the alleged kidnaping of John (Jake The Barber) Factor in and about Chicago, Cook County, Illinois in the months of July and August, 1933, including, specifically transcript, records, memoranda, and other data with respect to certain show ups held in the offices of the Federal Bureau of Investigation, Chicago, Illinois, on or between the dates of July 15 19 to July 24, 1933, inclusive, together with all copies, drafts, and vouchers relating to the said documents, and all other documents, letters, and paper writings whatsoever, that can or may afford any information or evidence in said cause."

Now, are you asking anything in addition pursuant to that last clause?

By Mr. Johnstone: No, sir. Specifically, I want the records of the show ups.

By the Court: You want the

"records of investigation made and statements of witnesses taken and procured in connection with the alleged kidnapping of John (Jake The Barber) Factor in and about Chicago, Cook County, Illinois, in the months of July and August, 1933, including, specifically transcript, records, memoranda, and other data with respect to certain show ups held in the offices of the Federal Bureau of Investigation, Chicago, Illinois, on or between the dates of July 19 to July 24, 1933, inclusive"

is that what you want?

By Mr. Johnstone: That is correct.

152 By the Court: Now, what are the regulations that prohibit the production of those papers?

By Mr. Kerner: Order No. 3229: (reading)

"Office Of The Attorney General
Washington, D. C.
May 2, 1939.

Order No. 3229

Pursuant to authority vested in me by R.S. 161 (U. S. Code, Title 5, Section 22), it is hereby ordered:

"All official files, documents, records and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, The Assistant to the Attorney General, or an Assistant Attorney General acting for him.

153 Whenever a subpoena duces tecum is served to produce any of such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein, on the ground that the disclosure of such records is prohibited by this regulation.

Frank Murphy,
Attorney General."

By Mr. Kerner: The thing that occurs to me, if the Court please, is this—

By the Court: Is there a supplement to that?

By Mr. Kerner: Yes, your Honor. There is a supplement.

This supplement is headed: (reading)

“Department of Justice

Washington 25, D. C.

June 6, 1947

Order No. 3229

Supplement No. 2

To All United States Attorneys:

154 Procedure To Be Followed Upon Receiving A Subpoena Duces Tecum

Whenever an officer or employee of the Department is served with a subpoena duces tecum to produce any official files, documents, records or information he should at once inform his superior officer of the requirement of the subpoena and ask for instructions from the Attorney General. If, in the opinion of the Attorney General, circumstances or conditions make it necessary to decline in the interest of public policy to furnish the information, the officer or employee on whom the subpoena is served will appear in answer thereto and courteously state to the court that he has consulted the Department of Justice and is acting in accordance with instructions of the Attorney General in refusing to produce the records. The officer or employee should bring with him a certified copy of Order No. 3229, prohibiting the unauthorized disclosure of official records, since the court does not take judicial notice of an intra-departmental order of this sort which is not published. The United States Attorney should be informed of the exact time of the subpoenaed person's appearance in court and be notified at once if there is any difficulty about persuading the court to accept the certified copy of the order as an answer to the demand to produce the records.

It is important that there should be no appearance of arbitrary refusal to comply with the subpoena and that every

respect should be paid to the court's order. Therefore, the officer or employee should, unless directed to the contrary by the Attorney General, bring with him the records and documents which are called for by the subpoena even though the Department takes the position that it is not necessary to produce them. Thus, a subpoena is complied with, although a reason is offered for not actually submitting the documents requested.

It is not necessary to produce the original documents; copies of official records, removal of which the Department's own files would cause great inconvenience, are acceptable in response to a subpoena. If a subpoena is 156 so vague and general in its terms that it would require the production of all the files with relation to a given matter, there should be a request for a more specific statement as to what is required. It is not necessary to bring the required documents into the court room and on the witness stand when it is the intention of the officer or employee to comply with the subpoena by submitting the regulation of the Department (Order No. 3229) and explaining that he is not permitted to show the files. If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed. The records should be kept in the United States Attorney's office or some similar place of safe-keeping near the court room. Under no circumstances should the name of any confidential informant be divulged.

Tom C. Clark,
Attorney General.

By the Court: What is that statute that is referred to, Mr. Kerner?

157 By Mr. Kerner: The statute is Title 5, Section 22, which reads as follows:

"Departmental Regulations. The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

By the Court: Is that all?

By Mr. Kerner: Yes, sir.

By the Court: Well, of course, the question first arises whether or not the Regulation is consistent with law.

By Mr. Kerner: One of the leading cases is *Ex Parte Sackett*, 74 Federal Reporter Second Series, beginning at page 922.

By the Court: 74 what?

By Mr. Kerner: 74 Federal Reporter, Second Series, page 922.

This was a case in which a subpoena had been served upon a Special Agent of the Federal Department of Investigation. The same question arose in that case as has arisen here. And the court in that case held that the "Federal Court could not compel Special Agent in Charge of Division of Investigation of Department of Justice to produce, in private litigation under anti-trust laws, copies of defendant's private documents made by Bureau of Investigation and in physical possession of such agent, where agent relied on lawful departmental regulation and special order of Attorney General prohibiting production of such confidential records."

Citing 5 United States Code Annotated Section 22.

By Mr. Johnstone: My comment on that, if the Court please, is that where you have got a case in which the United States is a party—and the United States is a party in every habeas corpus proceeding based on the violation of constitutional rights, that the rules as between private litigants should not apply.

I have four authorities—

By the Court: Just let me look at this one a minute.

By Mr. Johnstone: Certainly.

159 (Book handed to the Court.)

By the Court: This case does not help us very much on the question of whether or not the papers should be produced. It might help Mr. McSwain. But in this case of *Ex Parte Sackett*, the last thing the court says is this:

"Whether or not the Attorney General could be compelled to produce such records in response to a subpoena or to testify concerning them is a matter which is not involved."

By Mr. Kerner: Correct. The Attorney General actually was not served in this matter. The subpoena was served upon me.

By the Court: Yes.

By Mr. Kerner: In this District, service not being able to be obtained upon the Attorney General. But rather than

stand upon that technicality it was my thought that we should come into court and explain the matter to the Court so that a decision could be made, because it would also affect Mr. McSwain's appearance upon the witness stand.

By the Court: The situation is this: The relator says the documents are material to the presentation of his case.

The United States, which is only a nominal party to 160 this proceeding, but theoretically it is seeking to secure to this relator his constitutional rights. It is my duty to accord them to him if I can.

I do not think this case decides it—it rather strong-arms the question of whether this regulation is within the statute—it just strongarms it.

By Mr. Kerner: Yes. There is one thing that I wanted to point out in this case, that in the paragraph just above the syllabus paragraph which I read it is stated in that case that the documents were material. There is no such determination in this matter as yet that they are material.

By the Court: I cannot determine whether they are material until I see them.

By Mr. Kerner: That is correct, sir. That is the point upon which we argue.

By the Court: Now what? Is this relator to be deprived of having his counsel look at them?

By Mr. Kerner: I would undertake to say this—

By the Court: I say, is he to be deprived of that?

By Mr. Kerner: It is a matter of discretion with the Court to ascertain whether or not they are material, 161 and I will provide them for the Court's personal perusal.

By the Court: What can I do in looking at them without counsel looking at them? He cannot make his record on that.

By Mr. Kerner: Well, I am standing on my instructions here that I cannot produce them, on the orders of the Attorney General.

By the Court: Is this your best case?

By Mr. Kerner: Yes.

By the Court: Have you any others you want to call my attention to?

By Mr. Kerner: Not at this time. They are all of a similar nature.

By the Court: What is your best case?

By Mr. Johnstone: My best case is a comment on the

Sackett case, from Dean Wigmore, if the Court please, which is very brief.

Section 2378a. Dean Wigmore said, as to this particular decision:

"Here then was a party to a civil suit deprived of his proof by the opponent's destruction of the materials and by the government's refusal to produce the only available copies of those materials,—a refusal based on nothing 162 but an abstract generality of 'public policy.'"

"What should have been done by the court was to order the Attorney General to appear and state the specific manner in which public policy was claimed to be involved, and then the court to determine whether that claim was valid.

"The menace which this supposed privilege implies to individual liberty and private right will justify us in repudiating it before it is too solidly entrenched in precedent. More than once have plain warnings been given us of its potency for abuse:"

By Mr. Johnstone: There is a very recent case, *Zimmerman v. Poindexter*, 74 Fed. Supp., 933, which involves FBI records. And there the Court said,

"* * * unless a subpoena for the production of documentary material is both unreasonable and oppressive, it should be effectuated by the court, unless under applicable and lawfully consistent Executive regulations the court after judicial scrutiny concludes that the National interests or the specific situation embodied in the record before 163 the court justifies withholding discovery."

It makes a point that I want to make on this, that in these cases the court must have the right to examine and determine; and the court must have the right to make the determination as to whether or not any particular records should be produced.

By the Court: Anything further?

By Mr. Johnstone: That is all I have.

By the Court: Anything further from you?

By Mr. Kerner: No, sir.

By the Court: I am of the opinion that the regulation as drafted is broader than the statute permits, because the statute provides that these regulations shall only be valid to the extent that they are "consistent with law".

Now I cannot believe that any department head, no matter how exalted he may be, can say to the courts that the records of his department may not be available to the in-

vestigation of questions heard in the courts. That cannot be true. And whether or not these particular papers in question here are material, I don't know. But the parties to this proceeding have a right to have somebody other than the Department determine that question.

164 I would be very glad if this Court were not called upon to determine it, but apparently it is. And I want to proceed to determine that question. I want the advice of counsel in respect of my determination of it. I cannot look at these papers without the advice of counsel, without counsel advising me in what particular they may or may not be material. I want the advice of counsel for the relator, and I want the advice of counsel for the respondent. They are all reputable members of the Bar and officers of the Court.

I cannot believe that public security is going to be adversely affected by their seeing those papers.

Now, howsoever you want to meet that question is all right with me. I am ready to rule on it. I want to rule effectively; I don't want to say, "Please do this." If you can suggest a method whereby I can rule effectively I will be very glad to have it.

By Mr. Kerner: Your Honor, I have a suggestion. May I produce these documents before your Honor in chambers, with counsel present, and I shall read them?

By the Court: Counsel for both sides present?

165 By Mr. Kerner: Yes.

By the Court: Will that be satisfactory to you?

By Mr. Johnstone: Yes.

By the Court: Satisfactory to you?

By Mr. Schwartz: Yes, that will be satisfactory to us.

By Mr. Eardley: Yes.

By the Court: And you, Mr. Cunningham?

By Mr. Cunningham: Yes.

By the Court: Very well. I think that is a good suggestion.

By Mr. Kerner: What time would the Court like to suggest.

By the Court: What time would you suggest?

By Mr. Kerner: It is almost 2 o'clock. Shall we say two o'clock, or meet before the court opens?

By the Court: Two o'clock.

(Whereupon the Court gave attention to other phases of the matter on hearing, not related to said subpoena duces tecum.)

(Whereupon a recess herein was taken until 2:00 o'clock p. m. of the same day, June 1, 1949.)

166 Met pursuant to adjournment.

Present:

Mr. Johnstone, Mr. Bryant, Mr. Eardley, Mr. Schwartz, Mr. Cunningham, Mr. Kerner, Mr. Lulinski, Mr. Scariano and other Counsel.

And thereupon the following further proceedings were had herein:—

By the Court: Will counsel for the parties and the official reporter step into chambers, and such persons as you want, Mr. Kerner?

By Mr. Kerner: No, sir, just counsel.

(Thereupon Court and Counsel and the Official Reporter retired to chambers, where the following further proceedings were had herein:)

By the Court: Let the record show who is present.

167 By Mr. Kerner: For the Government:

Mr. Kerner, Mr. Lulinski and Mr. Scariano.

By Mr. Eardley: For the State of Illinois:

Mr. Eardley, Mr. Schwartz, Mr. Cunningham.

By Mr. Johnstone: And Robert B. Johnstone, for the relator.

By the Court: What proceedings do you suggest?

By Mr. Kerner: I suggest, frankly, in a rather informal manner to cover the matter that I want to discuss here.

By the Court: I don't care how much or how little record you gentlemen want to make, I mean the parties.

By Mr. Kerner: As far as I am concerned, I don't think any record need be made, depending upon finalties.

There are just certain disclosures I want to make here so that the Judge may come to some decision on the matter.

By Mr. Schwartz: When you suggest privately, do you want it off the record?

168 By Mr. Kerner: I would prefer to have it off the record because of the dangerous character of certain things that I am going to reveal.

By Mr. Johnstone: As far as I am concerned, I am per-

fectly willing to have the United States Attorney submit the material to the Court, and abide by the result.

My object is to do all that I can to obtain primary evidence of those things. Of course, if the primary evidence is not forthcoming I will have to resort to secondary evidence.

I do not want to embarrass the Government in any way. But I feel that the rule in these cases should be that the material should be submitted to the Court in order that the Court as a judicial officer might determine whether or not it should be produced in a given case.

By the Court: Suppose we do this, then, if that is satisfactory—suppose Mr. Kerner produces the material which is within the reach of the subpoena and submits it to counsel for the relator and to counsel for the respondent, and then you can look at it, and then if you have any controversy about it I will act on it, otherwise—

By Mr. Kerner: May I make a suggestion, if the 169 Court please?

By the Court: Yes.

By Mr. Kerner: I am still under orders not to actually produce the documents.

I have previously spoken to Mr. Johnstone, and I think I know what he wants, and what he is looking for. I have read all the documents that refer to this case that Mr. Johnstone is interested in. And the reason I do not want to produce the records here at this time is that there are certain things in those reports that if it ever gets back to the individuals tied up in this case, we are in fear that someone is going to lose his life—and we feel reasonably certain of that.° And there are names and relationships and everything that suggest which would be revealed. And we feel that they would be killed.

Now, that is included in a portion of the documents that you have covered by the subpoena, and it is this portion from the 2nd of July to August, 1933.

By Mr. Johnstone: That is the portion that is germane to the lawsuit, since what I am interested in is the fact that a general investigation was carried on between the 170 State's Attorneys office, the State's Attorney's police and the Federal Bureau of Investigation during that period, which resulted in a determination to send my client up to St. Paul to stand trial in that case, and not keep him here in connection with the Factor case; and this Factor

case was a case which was kept by the Government authorities working together as a second string to their bow, which is easily understandable when we go back to the press of that time, to eliminate my client from circulation.

It is my belief that the report and those evidences of the activities along that nature at a time when it was both that—and certainly with respect to this Factor situation where there was no interstate feature involved—and it is in connection with that that I believe my client's constitutional rights were violated. And for that reason I believe this material is material and relevant to the inquiry, directly so because of the nature of it.

Now, I do not want to be misunderstood. It is very understandable in view of the feeling generally about the kidnaping problem, and ex-bootleggers and that sort of thing, that anyone in public office probably necessarily
171 would have to try to convict somebody for anything like that.

It is my feeling that Roger Touhy in both of these cases was the victim of that accidental circumstance and of the feeling at the time and the tremendous pressure brought on both the Government and the State authorities to do something about such persons who seemed to be mocking at law and order. And he was the one, accidentally or otherwise, who happened to be selected.

And I believe these files are necessary to show that working together, regardless of what the ultimate result is.

And that is my position.

Formally, to make my record on it, I presume I would have to question Mr. McSwain as to whether he will produce the records, and ask for an order directing that he do so. And if he refuses it would be a matter for contempt. But it seems to me we should not have to come to that determination.

By Mr. Kerner: Perhaps I haven't made myself clear.

I said that period would cover July and August, 1933. That is two months of investigation. And that there is only one item in there which could have any concern
172 with your matter directly at all—only one matter, one report. And that is the part you want to know something about, the show up at the Bureau of Investigation. That is correct, is it?

By Mr. Johnstone: That is right.

By Mr. Kerner: There is a stack of reports approximately five or six inches high, in one folder, and another

envelope, another five or six inches high that have absolutely nothing to do with the show up whatsoever. And that is why I say that if I were forced to produce all these documents they would be all concerning extraneous matters, or would do no one any good, and probably would bring about the death of at least one man who was a confidential informer.

Now, a word further as to why I do not think it is necessary to bring in that report as to the show up, there is nothing positively or negatively that will help you in that show up. I have read over the report myself.

By Mr. Johnstone: So far as I am concerned, that fact alone is a step on the basis of which the Court is entitled to give much greater weight to secondary evidence which I will have to produce on the basis of this statement of 173 what happened at that show up. The best evidence rule requires me to get the record of who was there if I can get it. And it is for that purpose I have served the subpoena.

By Mr. Kerner: May I ask just one question? I was not present, nor of course do I have any knowledge whatsoever personally, but I can perhaps help you by telling you who was there. But outside of that I do not see how this report would be of any value.

By Mr. Johnstone: Well, my information is that Factor was there, and Factor would not identify my client Roger Touhy at that show up. And that is the formal fact that I want to determine.

By Mr. Kerner: I will tell you what this statement contains. It is purely a report, and is not evidence, of course. I think we will all agree with that. Factor did not identify him by face. He identified him by voice. And that is all that is in all of these reports that would be of any value to you anywhere along the line.

By Mr. Johnstone: That statement alone is proof of perjury because I understand Factor identified him by face.

By Mr. Kerner: That may have come later. I am just telling you what was in that report, that would be of 174 any value. It is purely a report or summary. I don't know who the individual is. And that certainly is not evidence. And I do not see how it would be of any value to you for purposes of impeachment—no value as evidence.

By Mr. Johnstone: I disagree with you on the latter point because my theory of the case is—which I have ex-

plained a moment ago—that a statement by an FBI Agent under these circumstances is the same as a statement by a party. And therefore the statement that he did not identify him by face that you have referred to, is admissible as an admission.

By Mr. Kerner: Oh, not the statement, not the report itself.

By Mr. Johnstone: It makes no difference where it appears—assuming that that I am right, and under these pleadings I am confident that I am, that an agency of the Government is in the position of the adverse party here.

By Mr. Kerner: Well, on that I don't agree with you.

We are interested in the production of everything that is possible to assist you with your case, and the same as
175 the State of Illinois, as the Judge has stated this morning, and I think properly so, that we have an interest in this matter because of the question of civil rights.

By Mr. Johnstone: That is right.

By Mr. Kerner: And also because of that phase of it we also would produce and would bring in anything we were able to to assist you in this matter.

Now, if you will agree on that subject perhaps we may get an agreement for the Judge to look over this one report—all the other reports have absolutely nothing to do with it; there are a couple of interviews with persons who were not witnesses at any time; there are reports from people who sought publicity in the matter, and other informers who were never used in the case.

By Mr. Johnstone: That is right, and I want to have it established, the one thing which is an essential element of my case, and that is the tremendous activity on behalf of this agency of the Government which, so far as the Factor case is concerned, was purely an intrastate matter, and in which the Federal Bureau of Investigation as I understand it had no authority.

By Mr. Kerner: They had no authority, that is correct.

And that is why he was not indicted and prosecuted by
176 the Federal Government. But there was a certain fuss or whatever you want to call this kidnaping, or alleged kidnaping, in which there was a report that he was taken over to Mexico. And that is when the Federal Bureau of Investigation became interested actively in the matter. And since it was not an interstate matter the Bureau files were closed.

By Mr. Johnstone: I would like to know among other things as to what date the Bureau files were closed.

By Mr. Kerner: I can get you information concerning that.

By Mr. Johnstone: And the circumstances under which the determination was made not to keep Roger Touhy in the State of Illinois but on the other hand to take him back up to Elkhorn, Wisconsin, and his eventual trial off to Milwaukee there, that everybody knows he didn't have anything to do with it.

* By Mr. Kerner: The information you have just asked for you can get if you come to my office. It is not part of this. I will give you that information.

But we conceive it is a great mistake to try to procure the production of all these documents in open court 177 when it will be of absolutely no value to you and will probably bring about the death of someone.

By Mr. Johnstone: I certainly don't want to bring about the death of anybody. However, the principle involved here is something that if people are not willing to die for it our form of government could not continue to exist.

By Mr. Kerner: But I don't have the choice of killing that person.

By Mr. Johnstone: I know it.

By Mr. Kerner: That is my position, frankly.

By Mr. Johnstone: After all, this is a habeas corpus proceeding. And in a habeas corpus proceeding the broadest possible latitude is given to the trial court. The trial court can examine witnesses, affidavits, depositions, and what have you, all to the end that essential justice may be done.

My own feeling is that the proper thing to do would be to permit the Court to examine these things without any of us.

By the Court: I don't want to see them—I don't want to see them without counsel.

By Mr. Kerner: I know that you are interested in the people at the show up at the Bureau. Factor was not present on that day.

178 By Mr. Johnstone: He was present—

By Mr. Kerner: At one show up—one show up, and that date was the 22d day of July, 1933.

By Mr. Johnstone: May I have the names of the other persons present?

By Mr. Kerner: All of the other parties who were along with him that night, the night he was kidnaped.

By Mr. Johnstone: They were present?

By Mr. Kerner: Yes.

By Mr. Johnstone: May I have the names of the Agents present?

By Mr. Kerner: I don't have the names of the Agents, except one, Devereaux, who wrote the reports. I don't know the names of the other Agents. Devereaux was the Agent who wrote up that report.

By Mr. Johnstone: Yes. I have talked to Mr. Devereaux about this case on numerous occasions.

By Mr. Kerner: If it is a question of names—

By Mr. Johnstone: I will say this for ex-members in your service, that he never by even the blink of an eyelash or word gave me to understand that he himself wrote the reports.

By Mr. Kerner: I can tell from the report that he was the Agent that wrote the report you are interested in.
179 And there is no record anywhere to indicate who else was present. There is no one presently in Chicago who can tell us who was present. And I gather from the communications between Washington and my own Bureau office—the Chicago office, that there is no record anywhere that will indicate what other Agent was present if Devereaux was not.

By Mr. Johnstone: I also want to know whether or not Capt. Gilbert or any of the other officials of the State's Attorney's office were present.

By Mr. Kerner: There is no indication in the report that anybody was present except FBI Agents. And from the wording of the report it appears there were two. And from reading the report it sounds as though Devereaux was one, but I cannot be certain.

By Mr. Johnstone: Your feeling is that he may have been because he was acting in some supervisory capacity, and may have written this report?

By Mr. Kerner: He was the supervisor of that report, yes; he was what they called the reporting agent.

By Mr. Johnstone: He at that time was stationed at South Bend?

By Mr. Kerner: His name is contained in that report as the reporting agent. That is all I can tell you about
180 that. And I don't think that the people from the State's Attorney's office were present. And as to who the

other individuals were who looked at Touhy, they were all of the members of the Factor party who left the Dells that evening—that I think is Mrs. Factor, Jerome Factor, Epstein, and Reddick was the colored chauffeur in the last car—there were three cars, a Chevy, a Dusenbergs and the Cadillac. And I think the Chevrolet had kept on to the south, it was moving faster than the Dusenbergs and the Cadillac.

By Mr. Johnstone: On this specific item, if the Court please, I cannot see where or how anybody could possibly be injured.

By Mr. Kerner: They won't be injured in fact because I want to try to bring this information to you in an informal fashion, because my orders are that I cannot produce these reports. But I am trying to help you as much as I can.

By Mr. Johnstone: I appreciate that.

By Mr. Kerner: I have told you that before. And that is still my position. If that information is of any value to you, here it is. But I cannot produce the reports. And I have gone over all the other reports in that period of 181 July and August, and they are personal interviews with individuals who did not testify in the case at the State trial.

By Mr. Schwartz: For the purposes of the record, your Honor, since this discussion has been going back and forth between Mr. Kerner and Mr. Johnstone, at this time I would like to state the position of the respondent, who in this case is Joseph E. Ragen, the Warden of the Illinois State Penitentiary, and that this matter now being discussed between Mr. Kerner and Mr. Johnstone is not within the knowledge of the respondent. In other words, the Government here is really here as an intermediate party, and the matters under discussion are neither records nor matters within the knowledge of the respondent in this particular case.

By Mr. Johnstone: I wish to ask the Court that the specific report referred to be produced, namely, Mr. Devereaux's statement. Mr. Devereaux is in the city and is subject to subpoena. I have a subpoena made out for him.

By the Court: I guess I misunderstood Mr. Kerner this morning. I got the impression, maybe because I wanted to do it, that he was going to submit to counsel, for the consideration of counsel, the papers which are called for 182 by this subpoena; and that I understood that counsel would make no announcement of anything in those pa-

pers other than such as was really material to the issues before the Court. But I guess I misunderstood you.

By Mr. Kerner: I did not intend actually to bring the reports in because I was still under the orders of the Department.

By the Court: Well, I misunderstood you.

Now, I will say to you frankly, if he really insists on this I will use all the power I have to get them. What that power is I don't know, but what it is I am going to try to find out. And I won't spend very much more time on it. I am ready to do something. All that you have to do is start to make your motions.

We had better go into open court.

(Thereupon the Court, Counsel and the Official Reporter returned to open court: whereupon the following further proceedings were had herein:)

By the Court: Proceed, Gentlemen.

By Mr. Johnstone: If the Court please, I move that "George B. McSwain, Agent in Charge" for this District of the Federal Bureau of Investigation, be directed by 183 the Court to produce the documents specified in the subpoena heretofore served upon him and upon the Attorney General of the United States through Mr. Otto Kerner, Jr.

By the Court: Is Mr. McSwain here?

By Mr. Lulinski: Yes.

By the Court: Let him take the stand.

By Mr. Kerner: Before we proceed, may I make a statement as to the subpoena served upon me?

By the Court: Yes.

By Mr. Kerner: The subpoena served upon me was for the Attorney General. I believe the service was bad. No service was had upon the Attorney General.

By Mr. Johnstone: I do not contend that. The service was had on Mr. Kerner as the representative of the Department of Justice in this District, and it was good service. It has handed by me to Mr. Kerner in his office in this building and the witness fee was tendered.

By the Court: Swear the Witness.

184 GEORGE R. McSWAIN, called as a witness herein,
having been first duly sworn, testified as follows:

By the Court: Proceed.

Direct Examination by Mr. Johnstone.

Q. State your name, please.

A. George R. McSwain.

Q. Your address?

A. Stevens Hotel, Chicago, Illinois.

Q. Your occupation?

A. Special Agent in Charge of the Federal Bureau of Investigation.

Q. That is for the District which includes Chicago, Illinois?

A. That is correct.

Q. Where are the offices of your Bureau in Chicago?

A. Room 1900, 105 West Adams Street.

Q. Mr. McSwain, prior to the institution of the hearings in this case a subpoena duces tecum was served upon you by me, was it not?

A. That is correct, sir.

Q. Calling for the production of certain documents and records in your possession in connection with the Touhy 185 investigation, is that right?

A. As was read to the Court here this morning.

Q. The subpoena which the Court read this morning was the subpoena which was served upon you?

A. That is correct.

Q. Have you produced the documents in response to the subpoena given you?

A. No, sir, I haven't.

Q. Will you produce them?

A. I must respectfully advise the Court that under instructions to me by the Attorney General that I must respectfully decline to produce them, in accordance with Department Rule No. 3229.

By Mr. Johnstone: If the Court please, I ask that the witness be directed to produce the documents called for by the subpoena.

By the Court: Mr. McSwain, I conceive it to be my duty to advise you that unless you do produce those records I

shall have to punish you for contempt of this Court; and I shall do that unless you do produce them.

By Mr. Kerner: May it please the Court, as counsel for Mr. McSwain I too have been in touch with Washington, and we cannot produce those reports, although we should like to, under order from the Attorney General, under Order 3229.

By the Court: Have counsel for the relator any suggestions as to the punishment which should be imposed upon this witness?

By Mr. Johnstone: Well—

By the Court: What?

By Mr. Johnstone: As to punishment, the only punishment that would be effective is that he be taken into custody until such time as the records are produced. I do not feel I can suggest punishment in view of the fact that Mr. McSwain is doing his duty as he sees it.

By the Court: Well, unless some of his superior officers want to sit in his place and take the punishment—I will punish the last man that will take the responsibility for it.

By Mr. Johnstone: If Mr. McSwain is to be placed in custody I would suggest that it be in the custody of the Attorney General or—

187 By the Court: Well, now, I am not going to slap anybody on the wrist. It embarrasses me to use such powers as this Court has, but I use them to try to make them effective, or I don't use them. If I use them and make them effective I am not going to slap Mr. McSwain or anybody else on the wrist. That is all there is to that. I am not going looking for opportunity to put this amiable gentleman in jail; but amiable or otherwise, if he stands in defiance of the lawful order of this Court I will punish him to the best of my ability.

What do you move?

By Mr. Johnstone: I move that the Court—

By the Court: Have you consulted the books with respect to the punishment which we can properly impose?

By Mr. Johnstone: I have not, sir.

By the Court: I suggest you do that. And I will continue this particular matter until tomorrow morning at ten o'clock. At that time be prepared to advise me definitely as to what punishment I can impose for contempt of
188 this Court, which I think has been shown.

By Mr. Johnstone: Very well, sir.

By the Court: (Addressing the witness.) You will report here at ten o'clock tomorrow morning, Mr. McSwain.

By the Witness: Yes, sir.

(Thereupon the witness left the stand.)

(Thereupon the Court gave attention to other phases of the case on hearing, not connected with the matter of said subpoena duces tecum.)

(And thereupon the further hearing of the above-entitled matter, was continued until the following day, June 2, 1949, at the hour of 10:00 o'clock a. m.)

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Chicago, Illinois,
June 2, 1949,
10:00 o'clock a. m.

Met pursuant to adjournment.

Present:

Mr. Johnstone, Mr. Bryant, Mr. Eardley, Mr. Schwartz, Mr. Cunningham, Mr. Kerner, Mr. Lulinski, Mr. Scariano and other Counsel.

And thereupon the following further proceedings were had herein:—

By the Clerk: The case on trial, *Touhy vs. Ragen*.

By Mr. Johnstone: Your Honor asked me to advise you this morning.

By the Court: Proceed.

By Mr. Johnstone: If your Honor please, under 190 Rule 45(f) of the Rules of Civil Procedure, disobedience to a subpoena is to be punished as a contempt.

Now, up to last June, contempts were governed by 28 U. S. Code 385—that is 385 of the Judicial Code, which provided that

“The courts of the United States shall have power to punish by fine or imprisonment at the discretion of the court contempts of their authority.”

Under the revision that was broken down into two sections, the first section of the Judicial Code,—it is Section 459, which now provides simply for the power of the court to take oaths and affirmations; and the second, comprising a part of the Revised Criminal Code, also passed last June, which appears in 18 United States Code 401 and 402.

The applicable section as to power is 401, which provides as follows:

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

"(1) Misbehavior of any person in its presence or
191 so near thereto as to obstruct the administration of justice;
tice;

"(2) Misbehavior of any of its officers in their official transactions;

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Section 402 sets up a specific procedure to be followed in connection with what are classified as "criminal contempts"; and those rules must be followed. And they involve among other things, notice to the contemnor, and an opportunity to be heard on definite charges. That is not the applicable section.

In my opinion, with respect to the type of contempt that is here involved, the situation is precisely the same as it was under Section 385, before the change, and which, so far as this Circuit is concerned, was fully considered by the Circuit Court of Appeals for the Seventh Circuit in a case that went up from this Court four years ago, the *Lederer* case, 140 Fed. 2d 136. And at page 139 there, Judge Evans in his opinion states that the manner of punishment for contempt is in the sole and unlimited sound discretion of the court, subject only to the constitutional provision
192 against cruel and unusual punishment.

And in the oral argument in that case Judge Evans said, "Well, what if somebody should be sentenced to be drawn and quartered?", and indicating that so far as the Court was concerned there that is the rule they have to follow.

That presents no limitation at all on the Court's authority. And it is necessarily so with this type of thing, because regardless of any statute, law, or anything else, it is inherent in the very existence of the court, this power to command obedience to its writs.

Now, in the case of *Penfield v. SEC*, 33 U. S. 534, 91 Lawyers Edition 717, the case came up where the Securities and Exchange Commission was seeking to have a particular subpoena enforced. And the District Court fined the party who refused to respond. That went up to the Circuit Court.

of Appeals, and to the Supreme Court of the United States, both of which courts specifically point out that the party in the lawsuit has a right to this remedy by the contempt power, and that the court's ruling should have been to place the person who refused to comply with the order in custody until such time as he did comply.

193 In my opinion this is a case in which that sort of a remedial order to compel obedience to the court's process should be required, and not one for punishment with a penalty such as would be entailed in a fine.

To go back to the change in the Code, the language of 402, which I believe leaves it completely as it was so far as this inherent right of the court to enforce its own process is concerned, is contained in 18 United States Code 402:

"This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law."

Now, it is my opinion of that section that it leaves the law right where it was.

Now, that section—I ran it down in the Citator and
194 I cannot find that it has been passed upon. This particular section I have just quoted was passed in June a year ago. And in my judgment the law with respect to this direct disobedience of the court's process is just where it was, and the court has what it always had, the power to punish by fine or imprisonment, and the power which is one that I feel should be exercised here to enforce its decree by the traditional method of placing the disobedient party in custody until such time as the order is complied with.

By Mr. Kerner: There can be no argument as to what the punishment in contempt should be. And I think Mr. Johnstone has stated it properly.

There is not much more that I can say. The court has indicated heretofore that it will hold Mr. McSwain in contempt of court.

As the Court will recall, when we were in chambers we

pointed out why we believed the instructions we received from Washington were controlling. And we have pointed out to the Court that—

By the Court: Well, I take it you desire to make a part of the record what transpired in chambers?

By Mr. Kerner: I would, sir.

195 By the Court: Let what transpired in chambers be made a part of the record.

By Mr. Kerner: Very well, sir. You mean, by inclusion from what the reporter's book showed, or by a statement of it here today?

By the Court: The reporter was present, and I assume made a record. Did you, Mr. Reporter?

By the Official Reporter: I did, sir.

By the Court: Let what transpired in chambers be made a part of the record.

By Mr. Kerner: And if I may make one statement, if your Honor please, we are in no position to allow these records to come in, and must respectfully refuse to present them to the Court.

By the Court: Have you a draft order?

By Mr. Johnstone: No, I have not, sir.

By the Court: When can you present me a draft order?

By Mr. Johnstone: I have asked Mr. Bryant to prepare one and have it over here within a half hour.

By the Court: Well, that ought to be prepared with some considerable care. I think it will probably be gone over with some considerable care. So take plenty of time.

196 And let the order provide that Mr. McSwain be adjudged guilty of contempt for failure to comply with the subpoena of this Court and for his failure to produce the papers there called for; and let the order provide that he stand committed to the custody of the Attorney General of the United States until such time as—unless and until he does comply or until he is discharged by due process of law.

When can you present that?

By Mr. Bryant: This afternoon.

By Mr. Johnstone: I will ask Mr. Bryant to prepare that.

By the Court: Very well.

Two o'clock?

By Mr. Lulinski: Two o'clock?

By the Court: Yes.

(Thereupon the Court gave attention to other phases of the case on hearing, not having to do with said subpoena duces tecum.)

(And thereupon a recess herein was taken until 2:00 o'clock p. m. of the same day, June 2, 1949.)

197

Chicago, Illinois,
June 2, 1949,
2:00 o'clock p. m.

Met pursuant to recess.

Present:

Mr. Johnstone, Mr. Bryant, Mr. Eardley, Mr. Schwartz, Mr. Cunningham, Mr. Kerner, Mr. Lulinski, Mr. Scariano and other Counsel.

And thereupon the following further proceedings were had herein:—

By the Clerk: The case on trial, *Touhy vs. Ragen*.

By Mr. Johnstone: If the Court please, Mr. Bryant was to meet me here with the order at a quarter of two. He is not here yet.

By the Court: Did you hear what counsel said?

198 By Mr. Kerner: Yes. I understood that the order was not here at the present time.

By Mr. Johnstone: Here he is.

(Mr. Bryant arrived.)

By Mr. Johnstone: May we have a moment to examine it?

By the Court: Yes.

(After a brief interval, the following:)

(Document handed to the Court.)

By Mr. Johnstone: If the Court please, I believe at the end of paragraph 2 on the finding there should be an additional one, in that Mr. McSwain when called before the bar of this Court refused in open court to produce those things, those records.

By the Court: Just write it in.

By Mr. Lulinski: I might also point out, your Honor, that in designating Mr. McSwain, he is a Special Agent of the Federal Bureau of Investigation, rather than a division of the Department of Justice, in charge of the Chicago, Illinois, office. That is his official designation.

By the Court: What is that?

By Mr. Kerner: He is Special Agent in charge of the Chicago office of the Federal Bureau of Investigation, Department of Justice.

199 By Mr. Johnstone: That is the way he is designated I think in the subpoena, if the Court please.

By the Court: Suppose you fix up the order as it should be and hand it to me.

Is this the original?

By Mr. Johnstone: Yes.

By Mr. Bryant: Yes.

(Document handed to counsel.)

By Mr. Kerner: With your Honor's permission we will take the order and have it retyped in a very few moments.

By the Court: Very well.

(Thereupon the Court gave attention to other phases of the case on hearing, not related to said subpoena duces tecum; after which the following further proceedings were had herein:)

(A document was handed to the Court.)

By Mr. Johnstone: Now Mr. Kerner, I notice that this order does not refer to the precise documents. The subpoena was handed up to the Court. May we agree that this subpoena which is marked Filed June 1 1949 by the Clerk, directed to "George B. McSwain" is the subpoena referred to in the order, and that the documents therein described are the documents?

By Mr. Kerner: There was no such reference in your original order.

By Mr. Johnstone: Yes, I know.

By Mr. Kerner: And we merely attempted to draft it in accordance with your wishes, since there was nothing in there. I have no objection to admit that this subpoena—

By Mr. Johnstone: I do not understand that you are making any technical point anyway.

By the Court: Anything further to be said?

By Mr. Johnstone: No, I don't think so.

By Mr. Kerner: Nothing further that we have to say, if the Court please.

(Which were all of the proceedings had on June 1 and 2, 1949, in said cause, with respect to the matter of said subpoena duces tecum.)

202 And on the same day, to wit, on the 1st day of June, 1949, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

203 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—48-C-448) • •

This cause this day being called for trial on the writ of habeas corpus issued to the relator Roger Touhy come the parties by their attorneys, comes also the respondent and brings the body of the relator into open Court and the trial proceeds and during the examination of the witnesses for the relator the relator by his counsel enters his motion that George B. McSwain, Agent in Charge, Federal Bureau of Investigation, be directed to produce documents as per subpoena duces tecum served upon him, the evidence adduced by the parties thereon and arguments of counsel are heard by the Court and the Court being fully advised in the premises it is

Ordered that the said George B. McSwain produce said documents, whereupon the said George B. McSwain states his refusal to produce said documents and on the Court's own motion it is

Further Ordered that the matter of the production of said documents be and it is hereby continued for further hearing to June 2, 1949, at 10:00 o'clock, A. M., and that the said George B. McSwain appear in this Court on June 2, 1949, at 10:00 o'clock, A. M., thereupon the examination of witnesses for the relator with regard to the writ of habeas corpus proceeds and during the examination of witnesses for the relator the hour of adjournment having arrived it is

Ordered that this cause be and it is hereby continued for further trial to June 2, 1949, at 10:00 o'clock, A. M.

204 And afterwards, to wit, on the 2nd day of June, 1949, being one^o of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

205 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-C-448) * *

ORDER.

This Matter Coming on to be heard upon the motion of the Petitioner that George R. McSwain, Special Agent in Charge of the Chicago Office, Federal Bureau of Investigation of the Department of Justice of the United States, be found guilty of contempt of this Court by reason of his declining to produce certain records of his office pursuant to a Subpoena Duces Tecum directing their production in Court and pursuant to the Order of this Court;

The Petitioner appearing by Robert B. Johnstone, his attorney, and George R. McSwain appearing in his own proper person and by Otto Kerner, Jr., United States District Attorney for the Northern District of Illinois;

And it appearing to the Court that George R. Mc Swain was duly sworn as a witness and asked to produce the records in his possession as Special Agent in Charge of the Chicago Office of the Federal Bureau of Investigation of the Department of Justice of the United States, requested in the Subpoena Ducés Tecum, duly served upon him,
206 but declined to do so on the ground that he was forbidden to do so by the regulations of the Department of Justice (Order No. 3229 and Supplement 2 of Order No. 3229 of the Department of Justice);

And the Court having directed George R. Mc Swain to produce the records called for by the Subpoena^o Duces Tecum theretofore issued, and the said George R. Mc Swain having, in open Court, refused to produce the records called for by the Subpoena Duces Tecum of this Court and

The Court having heard the evidence, and the arguments of counsel, and being fully advised in the premises, finds George R. Mc Swain guilty of contempt of Court in refus-

ing to produce the records referred to in the Subpoena Duces Tecum and directed to be produced to the Court by George R. Mc Swain;

It Is Ordered and Adjudged that George R. Mc Swain be, and he is hereby sentenced to be committed to the custody of the Attorney General of the United States, or his authorized representative for imprisonment until he shall obey the Order of this Court and produce to this Court the records referred to in the Subpoena Duces Tecum or until discharged by due process of law.

It Is Further Ordered that the United States Marshal take said George R. McSwain in custody forthwith.

Enter:

John P. Barnes,
Judge.

June 2, 1949.

Notice of Appeal.

207 And on the same day, to wit, the 2nd day of June, 1949 came George R. McSwain by his attorneys and filed in the Clerk's office of said Court his certain Notice of Appeal in words and figures following, to wit:

208 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division.

United States of America, ex rel., Roger Touhy, <i>Petitioner,</i>	} No. 48-C-448.
<i>vs.</i>	
Joseph E. Ragen, Warden, Illinois State Penitentiary, Joliet, Illinois, <i>Respondent.</i>	

NOTICE OF APPEAL.

Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, attorney for George R. Mc Swain, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the judgment and order entered by the District Court of the United States for the Northern District of Illinois, Eastern Division, on June 2, 1949, holding George R. Mc Swain in contempt and committing him to custody of the United States Marshal.

Otto Kerner, Jr.,
United States Attorney.
George R. Mc Swain.

(Attached Hereto Is the Following Certificate:)

209 United States of America, }
Northern District of Illinois. } ss.

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that on June 2, 1949, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure a copy of the foregoing Notice of Appeal was mailed to

Robert B. Johnstone,
30 North La Salle Street,
Chicago, Illinois.

Honorable Ivan A. Elliott, Atty. General,
State of Illinois,
208 S. La Salle Street,
Chicago 4, Illinois.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, this 2nd day of June, A. D., 1949.

Roy H. Johnson,
Clerk,

By Gizella Butcher,
Deputy Clerk.

(Seal)

210 And afterwards on, to wit, the 10th day of June, 1949 came the Appellant by his attorneys and filed in the Clerk's office of said Court his certain Statement Of Points Relied Upon On Appeal And Designation Of Contents Of Record On Appeal in words and figures following, to wit:

211 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-C-448) * *

**STATEMENT OF POINTS RELIED
UPON ON APPEAL.**

Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, attorney for the appellant, George R. Mc Swain, will rely upon the following points on appeal:

1. Section 22 of Title 5 of the United States Code is a proper, valid and constitutional statute.

2. Section 22 of Title 5 of the United States Code is a proper, lawful, valid and subsisting delegation of the powers of Congress to deal with property of the United States, to wit, the books, papers and records of the United States, and more specifically herein, the documents sought to be subpoenaed by the relator, as shown in the subpoena duces tecum filed in this cause on June 1, 1949.

3. Order No. 3229 and Supplement No. 2 to Order No. 3229 are proper, lawful, valid and subsisting regulations within the ambit, purview and scope of the lawful and properly delegated power granted to the Attorney General of the United States by the Congress of the United States under the provisions of Section 22 of Title 5 of the United States Code.

212 4. Under Section 22 of Title 5 of the United States Code and Department of Justice Order No. 3229 and Supplement No. 2 thereunto, the Attorney General of the United States of America solely is vested with the discretionary power to determine in the first instance whether or not papers, records and documents in his custody and control shall be made public in a court of law, or otherwise, and his determination with respect thereto is not judicially reviewable, nor the subject of proper inquiry by a court of law, including United States district courts.

5. United States district courts have not been vested with jurisdiction of the records and papers of the United

States. In the absence of a specific statute granting United States district courts such jurisdiction over property of the United States, the Court is without power over such property, or over the custodians thereof.

6. The United States district court is powerless to punish as in contempt a subordinate Government official who acts, or refuses to act, in accordance with the directions of his superior officer, who acts pursuant to one of his valid regulations promulgated pursuant to a lawful statute of the United States of America.

7. The action of the Attorney General of the United States of America, in directing the appellant not to produce the records requested in the subpoena duces tecum, filed on June 1, 1949, was not arbitrary nor capricious, but the result of extensive consideration and deliberation, and predicated upon the public interest.

8. The tender by the United States Attorney, acting for and on behalf of the appellant, George R. McSwain, to 213 deliver the requested Federal Bureau of Investigation reports (the only papers in custody of the appellant, McSwain) to the Court for its perusal and examination, with respect to the admissibility and materiality of the alleged information therein contained, under the circumstances of the case, was sufficient compliance with the subpoena duces tecum, particularly, in view of the stipulation of all counsel, permitting such action.

9. Under the constitutional doctrine of separation of powers, the Judicial branch of the Government is without power or authority over the records, papers and documents of the Executive branch.

Otto Kerner, Jr.,
United States Attorney.

214 IN THE UNITED STATES DISTRICT COURT.
 • • (Caption—48-C-448) • •

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL.

The Clerk is hereby directed to prepare certified copies of the following, for transmittal to the United States Court of Appeals for the Seventh Circuit, as the record on appeal:

1. Petition for writ of habeas corpus, filed on April 2, 1948, and amended petition for writ of habeas corpus filed on November 8, 1948, and amendment thereto filed on May 31, 1949.
2. Respondent's motion to dismiss, filed on October 8, 1948 and order denying said motion filed on November 16, 1948.
3. Return to writ of habeas corpus by respondent, filed on May 4, 1949.
4. Relator's traverse to respondent's return, filed on May 12, 1949 and amendments thereto, filed on May 17, 1949 and May 31, 1949.
5. Subpoena duces tecum on behalf of relator, together with proof of service, filed on June 1, 1949.
6. Memorandum of petitioner, filed on June 1, 1949.
7. Order of Court in full, filed on June 1, 1949, with reference to George R. Mc Swain and subpoena duces tecum served on him.
8. Order of June 1, 1949, continuing cause to June 2, 1949, and directing that George R. Mc Swain appear on last said date.
9. Draft order of June 2, 1949, committing George R. Mc Swain to custody for contempt.
- 215 10. Notice of appeal, filed on June 2, 1949 and proof of service thereof.
11. Docket entries of May 31, 1949; June 1, 1949; June 2, 1949; June 3, 1949 (showing filing of appearances only), and June 4, 1949.
12. Transcript of proceedings had on June 1, 1949 and June 2, 1949.
13. Statement of points relied upon on appeal, filed June 9, 1949.
14. This designation.

Otto Kerner, Jr.,
United States Attorney.

216 And afterwards, to wit, on the 12th day of July, 1949, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Elwyn R. Shaw, District Judge, appears the following entry, to wit:

217 IN THE UNITED STATES DISTRICT COURT.
 * * (Caption—48-C-448) * *

ORDER.

This cause coming on to be heard, on the petition of Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, to correct the transcript of proceedings had herein on June 1, 1949,

It Is Hereby Ordered that the transcript of proceedings be corrected in the following wise and manner:

1. On the last line of p. 35 of the transcript of proceedings, the word "not" is to be inserted immediately after the word "was", so that the corrected line will read, "and that is why he was not indicted * * *"

2. On line 4 of p. 36 of the transcript of proceedings, delete the words, "St. Paul", and insert in lieu thereof the word "Mexico", so that the corrected line will read, " * * * that he was taken over to Mexico."

3. In line 10 of p. 40 of the record, after the word "was", insert the word "moving", so that the corrected line will read, " * * * it was moving faster than the Dusen-berg * * *"

Enter:

Shaw,

*United States District
 Judge.*

218 The Following Docket Entries Appear of Record in the Clerk's Office of Said Court:

5-31-49

Filed Notices—two (2)

5-31-49

Filed Amendment to amended petition for writ of habeas corpus and to amended traverse

5-31-49

Filed Affidavit of Thomas C. McConnell

5-31-49

Order leave petitioner to file instant amendment to amended petition for a writ of habeas corpus and to amend traverse. Order respondent's Return heretofore filed to stand as Respondent's return to petitioner's amendment to amended petition for a writ of habeas corpus—Barnes, J.

5-31-49

Order Thomas C. McConnell excused from appearing and testifying as a witness in the above cause. On Court's motion order cause continued for trial to June 1, 1949 at 10 a. m.—Barnes, J. Mailed Notice to Attys. 6-2-49 (2 orders)

6-1-49

Filed Memorandum Brief on the question of the Court's right to inquire into the Constitutional validity of petitioner's sentence based upon a judgment of conviction under Paragraph 92 of the Criminal Code etc.

6-1-49

Filed Memo of petitioner

6-1-49

Filed Subpoena Duces Tecum

6-1-49

Cause called for trial. Opening statements heard. Evidence heard in part for petitioner. Order motion of petitioner that George B. McSwain, Agent in charge, Federal Bureau of Investigation be directed to produce documents as per subpoena duces tecum served upon him, entered, evidence & arguments heard and concluded, said George B. McSwain directed to produce said documents, and states his refusal to so do. On Court's motion said matter continued for further hearing to June 2, 1949, at 10:00 a. m. and the said George B. McSwain directed to appear on June 2, 1939, at 10:00 a. m. Further evidence heard for petitioner and adjourned to June 2, 1949 at 10:00 a. m.—Barnes, J.

6-2-49

Order George R. McSwain found guilty of contempt of Court in refusing to produce certain records and committed

to the custody of the Attorney General until he shall produce the said records or until discharged by due process of law. Order the said George R. McSwain remanded to the custody of the U. S. Marshal—Draft—Barnes, J.

6-2-49

Further evidence heard for petnd. Order Frank Schwaba, a witness in the above cause, directed to appear on June 3, 1949 at 10:00 A. M. Order adjourned to June 3, 1949 at 10:00 A. M.—Barnes, J. Mld. notice to Attys. 6-2-49

jb

219 6-2-49

Filed Notice of Appeal of U. S. Atty. for George R. McSwain—\$5.00 US

6-2-49

Mailed copy of Notice of Appeal to Robert B. Johnstone and Atty. Gen.

6-3-49

Order leave Edward H. Hatton, James A. Howell and Howard B. Bryant to enter their appearance as additional attorneys for relator—Barnes, J. Mailed Notice to Attys. etc.

6-3-49

Filed Appearance of Edward H. Hatton, James A. Howell and Howard B. Bryant

6-6-49

Filed Withdrawal of Appearance of Edward H. Hatton for relator.

6-6-49

Order leave Edward H. Hatton to withdraw as co-counsel for relator—Barnes, J.

6-6-49

On motion of counsel for relator order adjourned to Oct. 31, 1949 at 10 a. m. By agreement order entered on June 3, 1949 impounding certain records, vacated and set aside. Order relator remanded to custody of respondent—Barnes, J. Mailed Notice to Attys. etc. 6-13-49 (2 orders)

220 United States of America, } ss:
Northern District of Illinois. }

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Designation filed in this Court in the cause entitled: *United States of America, ex rel., Roger Touhy, Petitioner v. Joseph E. Ragen, Warden, Illinois State Penitentiary, Joliet, Illinois, Respondent*, No. 48 C 448, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 12th day of July, 1949.

Roy H. Johnson,
Clerk,

By Gizella Butcher,
Deputy Clerk.

(Seal)

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed transcript of record, filed in this Court on Nov. 23, 1949, in:

Cause No. 9916.

United States of America, *ex rel.* Roger Touhy,
Relator,

vs.

Joseph E. Ragen, Warden, etc.,
Respondent,

George R. McSwain,
Appellant,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 17th day of April, A. D. 1950.

(Seal)

Kenneth J. Carrick,
*Clerk of the United States Court of
Appeals for the Seventh Circuit.*

At a regular term of the United States Court of Appeals for the Seventh Circuit, held in the City of Chicago and begun on the fifth day of October, in the year of our Lord one thousand, nine hundred and forty-eight, and of our Independence the one hundred seventy-third.

United States of America, *ex rel.*

Roger Touhy,

Relator,

9916

vs.

Joseph E. Ragen, Warden, Illinois
State Penitentiary, Joliet, Illinois,

Respondent,

George R. McSwain,

Appellant.

Appeal from the
United States District Court for the
Northern District
of Illinois, Eastern
Division.

And afterward, to-wit, on the seventh day of February, 1950, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

February 7, 1950.

Before:

Hon. J. Earl Major, Chief Judge.
Hon. Philip J. Finnegan, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.

United States of America, *ex rel.*
Roger Touhy,

Relator,

9916

vs.

Joseph E. Ragen, Warden, Illinois
State Penitentiary, Joliet, Illinois,

Respondent,

George R. McSwain,

Appellant.

Appeal from the
United States District Court for the
Northern District
of Illinois, Eastern
Division.

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and the briefs of counsel, and on oral argument by Mr. Otto Kerner, Jr., counsel for the appellant, and by Mr. Robert B. Johnstone, counsel for the appellee, and the Court takes this matter under advisement.

And afterward, to-wit, on the twenty-fourth day of February, 1950, there was filed in the office of the Clerk of this Court the opinion of the Court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 9916. October Term, 1949, January Session, 1950.

United States of America, *ex rel.*
Roger Touhy,

Relator,

vs.

Joseph E. Ragen, Warden, Illinois
State Penitentiary, Joliet, Illinois,

Respondent,

George R. McSwain,
Appellant.

Appeal from the
United States District Court for the
Northern District
of Illinois, Eastern
Division.

February 24, 1950.

Before MAJOR, *Chief Judge*, FINNEGAN and LINDLEY,
Circuit Judges.

MAJOR, *Chief Judge.* Roger Touhy, relator in the court below, sued out a writ of habeas corpus against Joseph E. Ragen, Warden of the Illinois State Penitentiary, Joliet, Illinois, respondent in the court below, on the ground that he had been unlawfully convicted and was being illegally detained by respondent in violation of relator's constitutional rights. While the allegations of the petition for writ of habeas corpus are of little consequence in relation to the matter before us, it may be pertinent to note that it was alleged, among other things, that certain authorities of the State of Illinois and Cook County, Illinois, conspired to convict relator of kidnapping one John (Jake the Barber) Factor, and that relator was singled out for arrest, tried and convicted for a crime which never occurred.

While the habeas corpus matter was being heard in the District Court before Honorable John P. Barnes, and on May 13, 1949, counsel for relator caused a subpoena duces tecum to be issued, directed at George R. McSwain, Special Agent in charge of the Chicago office of the Federal Bureau of Investigation, and the Honorable Tom C. Clark, Attorney General of the United States, "c/o Otto Kerner, Jr., United States Attorney." The subpoena was served upon McSwain and service on the Attorney General was attempted by serving the United States Attorney for the Northern District of Illinois. The subpoena commanded that the named persons produce before the District Court "certain records of investigation made and statements of witnesses taken and procured in connection with the alleged kidnapping of John (Jake the Barber) Factor in and about Chicago, Cook County, Illinois in the months of July and August, 1933, including specifically transcript, records, memoranda, and other data with respect to certain show ups held in the offices of the Federal Bureau of Investigation, Chicago, Illinois, on or between the dates of July 19 to July 24, 1933, inclusive, together with all copies, drafts, and vouchers relating to the said documents, and all other documents, letters, and paper writings whatsoever, that can or may afford any information or evidence in said cause."

On June 1, 1949, McSwain personally and by the District Attorney as his counsel appeared in response to the subpoena duces tecum, and Mr. Robert B. Johnstone appeared for the relator. After an extended colloquy between the respective attorneys and the court, McSwain took the witness stand. More will be said later concerning the happenings in court, but at this point it is sufficient to note that McSwain, acting under instructions from the Attorney General, declined to produce the material commanded by the subpoena, and as justification for such refusal relied upon Department of Justice Order No. 3229, and Supplement No. 2 to said order, dated June 6, 1947. The court, on June 2, 1949, in the order appealed from adjudicated McSwain guilty of contempt of court because of his refusal to produce the records called for in the subpoena and directed that he be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment "until he shall obey the Order of this Court and produce to this Court the records referred to in the Subpoena Duces Tecum or until discharged by due process of law."

Title 5 U. S. C. A. Sec. 22 (R. S. Par. 161), in effect since 1872, provides:

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

The Attorney General of the United States, on May 2, 1939, pursuant to the authority vested in him by this statutory provision, promulgated Order No. 3229, which provides:

"All official files, documents, records and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of The Attorney General, The Assistant to The Attorney General, or an Assistant Attorney General acting for him.

"Whenever a subpoena *duces tecum* is served to produce any of such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by The Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein, on the ground that the disclosure of such records is prohibited by this regulation."

Putting aside for subsequent discussion Supplement No. 2, we shall first consider the relator's contention that Order No. 3229 is unauthorized by the statutory provision and is therefore invalid, or if it is in conformity, the statutory enactment is unconstitutional. This is on the theory, as we understand, that such a regulation is not "not inconsistent with law," as provided by the statute, for the reason that it represents an invasion by the executive department of the government upon the inherent power of the judiciary. And from a statement appearing in colloquy this appears to have been the reasoning of the District Judge.

That this contention is not sound is forcibly demonstrated by the cases, the more important of which are *Boske v. Comingore*, 177 U. S. 459; *Rosen et al. v. United States*, 245 U. S. 467; *Ex Parte Sackett*, 74 F. 2d 922; *Fussell et al. v. United States*, 100 F. 2d 995, and *In Re Valecia Condensed Milk Co.*, 240 Fed. 310 (there are many District Court opinions to the same effect). By these same cases it is equally well established that courts have no jurisdiction or power to punish executive officers or employees for obeying the orders or instructions of their superiors in adhering to regulations promulgated pursuant to statutory authority and requiring them to refuse to disclose or divulge information, records, documents or other data.

In the *Boske* case, *supra*, the Collector of Internal Revenue refused the production of certain reports made by distillers which were in his custody as an officer of the United States Treasury Department, and for such refusal was adjudged to be in contempt of court. The Collector's refusal was based upon a regulation substantially the same as Order No. 3229 here relied upon, and was promulgated under the authority of the same statutory provision. The court, in reversing the order adjudicating that the Collector was in contempt, among other things stated (page 469):

"The papers in question, copies of which were sought from the appellee, were the property of the United States, and were in his official custody under a regulation forbidding him to permit their use except for purposes relating to the collection of the revenues of the United States. Reasons of public policy may well have suggested the necessity, in the interest of the Government, of not allowing access to the records in the offices of collectors of internal revenue, except as might be directed by the Secretary of the Treasury. The interests of persons compelled, under the revenue laws, to furnish information as to their private business affairs would often be seriously affected if the disclosures so made were not properly guarded. Besides, great confusion might arise in the business of the Department if the Secretary allowed the use of records and papers in the custody of collectors to depend upon the discretion or judgment of subordinates. At any rate, the Secretary deemed the regulation in question a wise and proper one, and we cannot perceive that his action was beyond the authority conferred upon him by Congress. In determining whether

the regulations promulgated by him are consistent with law, we must apply the rule of decision which controls when an act of Congress is assailed as not being within the powers conferred upon it by the Constitution; that is to say, a regulation adopted under section 161 of the Revised Statutes should not be disregarded or annulled unless, in the judgment of the court, it is plainly and palpably inconsistent with law. Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress."

The court concluded (page 470) by stating that "the Secretary . . . may take from a subordinate, such as a collector, all discretion as to permitting the records in his custody to be used for any other purpose than the collection of the revenue, and reserve for his own determination all matters of that character." In that case, as here, the contention was made that the regulation was inconsistent with law. In denying such contention, the court stated (page 469):

"There is certainly no statute which expressly or by necessary implication forbids the adoption of such a regulation. This being the case, we do not perceive upon what ground the regulation in question can be regarded as inconsistent with law, unless it be that the records and papers in the office of a collector of internal revenue are at all times open of right to inspection and examination by the public, despite the wishes of the Department. That cannot be admitted."

In *Ex Parte Sackett*, *supra*, the facts were almost identical with those of the instant case. There, Sackett, Acting Special Agent in charge of the Federal Bureau of Investigation, was subpoenaed to produce certain records and documents in his possession as agent of the Department of Justice in a civil suit to which the government was not a party. Sackett, just as did McSwain in the instant case, appeared in response to a subpoena duces tecum and declined to produce the documents called for on the ground that by the rules and regulations of the Department of Justice, approved and promulgated by the Attorney General under the authority of the same statutory provision

above quoted, he was prohibited from producing the records and that in addition he had communicated with the Attorney General of the United States, just as was done in the instant situation, and had been informed by him "that the documents sought are part of the official and confidential records of the Department, that it is against public policy for the Department to produce any part of the documents obtained confidentially * * *." The trial court adjudged Sackett guilty of contempt for his refusal to produce in response to the subpoena. The Court of Appeals assumed the correctness of the determination made by the trial judge as to the materiality of the evidence but reversed the judgment appealed from and held that the documents called for, although physically in possession of Sackett, were in law in the custody of the Attorney General and that inasmuch as the witness was prohibited from producing them by the lawful rule of the Department, the court had no power or authority to compel him to do so. The court stated (page 923):

"The statute of the United States, 5 USCA § 22, Rev. St. § 161 (see footnote 1), authorizes the Attorney General to make rules concerning the custody of the papers and documents of the Department. In pursuance of this authority, the Attorney General has promulgated the rule (No. 65) as shown in the footnote 2. This regulation has the force of law, and the court had no jurisdiction or power to punish an officer for conforming to that law. [Citing numerous cases, including *Boske v. Comingore, supra.*]"

This court, in *In Re Valecia Condensed Milk Co., supra*, applied the reasoning and decision of the *Boske* case and reversed an order adjudicating the Secretary of the Tax Commission of the State of Wisconsin in contempt for refusal to comply with a subpoena to produce certain tax records. There, a provision of the State statute quite similar to the Federal provision was involved. This court cited the *Boske* case with approval and, concerning the contention that a refusal to produce was an impingement upon the power of the court, stated (page 314):

"Without in any degree trenching upon the essential and full power of courts to compel the production of papers, we must recognize also the generally declared public policy against revealing such returns—made, as they are, under compulsion of law, for the

particular purpose of taxation; a public policy repeatedly recognized by the courts. With an enactment such as the one in question, directed against the production of these returns, it is not lightly to be presumed that the public policy manifested by such statute was intended to be practically neutralized by the excepting words."

The holding of the *Boske* case has been cited and followed on innumerable occasions and, so far as we are aware, there is no reported case where it has been repudiated. In fact, it has been cited with approval by the Supreme Court as late as March 26, 1945, *Commissioner v. Wheeler et al.*, 324 U. S. 542, 547 (footnote). True, it has been severely criticized by Dean Wigmore in his work on Evidence, 3rd Edition, Vol. 8, Sec. 2378a *et seq.* In fact, Wigmore is the sole authority relied upon by relator in support of his contention that the regulation is invalid, other than some cases decided long prior to the decision in the *Boske* case.

True, relator cites a line of cases where disclosure in some form or another has been required. These cases, however, without exception so far as we are aware, apply to situations where the government as a party to the suit or otherwise has waived the privilege of non-production. It appears to be the theory of such cases generally that when the government becomes a party to a suit it does so the same as any other litigant, and that it cannot occupy the anomalous position of placing one foot within the judicial sanctuary and leaving the other without. But none of these cases disagree with the rationale of *Boske* and many of them expressly recognize it.

Conspicuous among such cases is that of *United States v. Andolschek et al.*, 142 F. 2d 503, where the government was prosecuting certain minor officials of the Alcohol Tax Unit. At the trial the defendants requested certain reports in the possession of the government which the trial court denied upon the ground that the regulation forbade disclosure. The Court of Appeals, after noting that the validity of a similar regulation was upheld in *Boske v. Com-ingore, supra*, stated (page 506):

"However, none of these cases involved the prosecution of a crime consisting of the very matters recorded in the suppressed document, or of matters nearly enough akin to make relevant the matters recorded. That appears to us to be a critical distinction. While

we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully."

In *United States v. Grayson*, 166 F. 2d 863, the court in a criminal prosecution sustained a request by the defendant that certain documents in the possession of the government be produced, and in doing so stated (page 870):

"Be that as it may, there is an obvious distinction between documents held by officials who are themselves charged with the administration of those laws for whose violation the accused has been indicted, and those which are not so held. All we need to hold—and all we have held hitherto—is that when the privilege is conditional upon the consent of such a department, the prosecution will fail unless the officials are willing to produce them."

A similar situation is disclosed in *United States v. Krulewitch*, 145 F. 2d 76. The court stated (page 79):

"When their possessor [referring to the government] chooses to bring into the light the transaction to which the communications relate, he may no longer suppress the communications themselves."

In *United States v. Beekman et al.*, 155 F. 2d 580, where the defendants were charged with a violation of the Emergency Price Control Act, the court states the rule as to waiver of privilege by the government thus (page 584):

"We have recently held that when the government institutes criminal proceedings in which evidence, otherwise privileged under a statute or regulation, becomes importantly relevant, it abandons the privilege. [Citing cases.]"

And the waiver of this privilege by the government has been invoked where it is the defendant. *Bank Line, Limited v. United States*, 163 F. 2d 133, and *O'Neill v. United States et al.*, 79 F. Supp. 827. Both of these cases were suits under the Admiralty Act, wherein the government by statute had consented to be sued. As was stated in the *O'Neill* case (page 829), the Admiralty Act "puts the government in all respects upon a par with private individuals in litigation under that Act."

Two cases are called to our attention wherein the government was not a party and where production was required. *Crosby v. Pacific S. S. Lines, Ltd.*, 133 F. 2d 470, and *Zimmerman v. Poindexter et al.*, 74 F. Supp. 933. Relator places much reliance upon the *Crosby* case and urges that it correctly states the rule applicable in the instant situation. A reading of those cases, however, discloses that they both are further illustrative of situations wherein the privilege of non-disclosure had been waived. In the *Crosby* case, correspondence in the possession of an agent of the British government by the name of Walsh was sought. The court, after noting that it was controlled by the same rule as "would apply to a similar department of government here," held that the privilege should be denied in the absence of a showing that "(1) existence of a rule of the British Ministry of Shipping that all correspondence between its officers is confidential; (2) existence of a direction, by an officer superior to Walsh, to Walsh that the correspondence is confidential; (3) existence of a direction to Walsh by an officer superior to Walsh, authorizing the latter to determine what correspondence is confidential; and (4) how the correspondence would in any manner jeopardize the public interest, safety or security." And the court concluded (page 475) by stating, "It is enough to say that for one to claim a privilege, he must make a showing that he is entitled to one, and that no such showing, in our opinion, was made here." Thus, there is nothing in this case which indicates the court would have required production if the privilege had been claimed by an agency of government authorized to do so; in fact, the opinion indicates that in such a situation the holding would have been different.

In the *Zimmerman* case, a subpoena calling for the production of certain documents, including reports made by the Federal Bureau of Investigation, was directed at the Commanding General of the Army. The Department of

Justice objected to such production and relied upon its Order No. 3229. The court reasoned that the regulation applies only to documents in the possession of the Department of Justice, or with its officers or employees, and pointed out (page 936), "The requisitioned material is here sought from a wholly different organization and from personnel in whose possession it has been voluntarily deposited by the Department of Justice." There again was a waiver of the privilege by the Department otherwise entitled to claim it.

We cite and quote from the cases in which production or discovery has been required of the government upon the basis of the waiver of privilege for the purpose of distinguishing from the rationale of the *Boske* case and those which have followed it and not for the purpose of deciding either what constitutes waiver on the part of the government or the extent to which it should be applied in a particular case. In this respect it is pertinent to note that even in those cases where production or discovery has been required it has usually been held or at least indicated by the court that the material or information sought should be submitted to the court for its determination as to materiality. *United States v. Krulewitch*, *supra*, page 79; *United States v. Cohen et al.*, 145 F. 2d 82, 92; *United States v. Ebeling*, 146 F. 2d 254, 256; *Crosby v. Pacific S. S. Lines, Ltd.*, *supra*, page 475; *United States ex rel. Schlueter v. Watkins*, 67 F. Supp. 556, 561.

Thus, we reach the conclusion that Order No. 3229 as promulgated by the Attorney General is authorized by the statute and confers upon the Department of Justice the privilege of refusing to produce unless there has been a waiver of such privilege.

Admittedly, the government was not a party to the proceeding out of which the subpoena in the instant matter issued. Did it waive its privilege of non-disclosure in some other manner? This brings us to a consideration of Supplement No. 2 to Order No. 3229 promulgated by the Department of Justice June 6, 1947, directed to all United States Attorneys and entitled "Procedure to be followed upon Receiving a Subpoena Duces Tecum." The letter of the Attorney General directed to U. S. Attorney Kerner, dated May 25, 1949, among other things stated:

"It is the Department's position that it should decline to produce the records in question. It is desired, therefore, that you proceed in accordance with the

instructions given in Supplement No. 2 of Order No. 3229. It is requested that you or one of your assistants be present at the hearing on May 31, 1949, in order to represent Special Agent McSwain."

The directive so far as here material provides:

"Therefore, the officer or employee should, unless directed to the contrary by The Attorney General, bring with him the records and documents which are called for by the subpoena even though the Department takes the position that it is not necessary to produce them. Thus, a subpoena is complied with, although a reason is offered for not actually submitting the documents requested."

It provides further:

"It is not necessary to bring the required documents into the court room and on the witness stand when it is the intention of the officer or employee to comply with the subpoena by submitting the regulation of the Department (Order No. 3229) and explaining that he is not permitted to show the files."

Immediately following that which we have just quoted is a statement which while somewhat confusing and ambiguous appears to amount to a contraction of the unlimited privilege otherwise possessed by the Department of Justice. The directive provides:

"If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed. The records should be kept in the United States Attorney's office or some similar place of safekeeping near the court room. Under no circumstances should the name of any confidential informant be divulged."

Certainly this language contemplates some circumstances when the material called for must be submitted "to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed." The challenging question is, what are the circumstances under which submission must be made? It appears that the officer or employee is only required to do so "if questioned". We construe those words

to mean that the material called for must be submitted to the court for the limited purpose stated if the person under subpoena is requested to do so. Conversely stated, it means that submission is not required in the absence of a request by the court or opposing counsel that it be made. And the directive to submit under the circumstances stated is to that extent a waiver by the Department of Justice of its non-production privilege.

McSwain was called as a witness and testified that he was a Special Agent in charge of the Federal Bureau of Investigation for the district including Chicago, Illinois, and that he had been served with a subpoena duces tecum calling for the production of certain documents and records in his possession. His examination continued:

"Q. Have you produced the documents in response to the subpoena given you?

A. No, sir, I haven't.

Q. Will you produce them?

A. I must respectfully advise the Court that under instructions to me by the Attorney General that I must respectfully decline to produce them, in accordance with Department Rule No. 3229."

It was upon this refusal that McSwain was adjudged in contempt of court.

It will be noted that he was called upon to produce all documents and material called for in the subpoena without limitation and that at no time was he questioned as to his willingness or requested to submit such documents and material "to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed." Therefore, if the adjudication is to be sustained it must be because of McSwain's failure to make unlimited production because he was never requested to or refused to submit on any other or different condition. Such a holding would mean that there was no privilege lodged in the Department of Justice to refuse production. In view of the law as announced in the cases which we have previously discussed, we think the theory is not tenable. Submission could only have been required to the extent the privilege had been waived by the Attorney General and for the purpose and in the specific manner designated.

More than that, in a colloquy between counsel and the court prior to the calling of McSwain as a witness, the Dis-

trict Attorney offered to provide the documents and material called for in the subpoena to the court for its personal inspection. This procedure was satisfactory to counsel for the relator, who stated, "My own feeling is that the proper thing to do would be to permit the Court to examine these things without any of us." To this proposal, agreed to by counsel for both McSwain and the relator, the court stated, "I don't want to see them—I don't want to see them without counsel."

Thus, the court was unwilling to examine the material for the purpose of determining its materiality and whether it was in the best public interest that such information should be disclosed. In our view, this was the precise duty imposed upon the court, and McSwain was not required to produce for any other purpose. The court's refusal in this respect, previously announced in open court, perhaps accounts for the fact that McSwain when on the stand was not requested to make production for such purpose.

The order appealed from is reversed and the cause remanded, with directions that appellant be discharged from the custody of the Attorney General.

LINDLEY, C. J., dissenting.

As I understand the law, the public policy controlling in our national jurisprudence is that a person should not be deprived of his liberty without giving him an opportunity to have access to material which might exculpate him, and that he should have a reasonable opportunity to produce evidence that may prove his innocence. Consequently, frequently arising is the broad question of whether an executive official is free to refuse disclosure of any evidence in his possession, regardless of its character, for any reason which to him may seem sufficient, "free in the sense that compulsory process against him is beyond the constitutional power of the legislature to authorize or the court to issue, physical compulsion being, of course, out of the question," (Judge Kirkpatrick in *O'Neill v. U. S.*, 79 F. Supp. 827). But this broad issue is not necessarily presented in this case, for, irrespective of what may be the constitutional limitations upon the power of other branches of government, the Department of Justice, acting under power granted by the Congress, has provided by its own directives, a method by which, by judicial decision, the rights of a person seeking to procure evidence in the custody of the

Department, are fully protected. In other words, those directives, having provided reasonable protection for the rights of applicants, satisfy constitutional demands.

Under the pertinent administrative directive, as I interpret it, it was the duty of appellant, as a subordinate in the Department of Justice, to produce the subpoenaed documents for examination by the court, in order that the latter might determine their materiality and whether their non-disclosure was essential to the public interest. But the evidence discloses that appellant himself, while on the witness stand, unqualifiedly refused to produce them, and the ultimate statement of the United States Attorney plainly indicates that, pursuant to instructions from his department superior, the actual records would not and could not be submitted to the court for its determination in the respects mentioned. Thus, he said expressly that he had never intended actually to produce the documents and that he could not do so under the orders of his superior. Thus, it seems clear to me that appellant, acting as he interpreted the directions of the Department of Justice compelled him to act, violated the directive. The inevitable result is that the Department, despite its own directive, has taken upon itself the determination of materiality and public interest and effectually prevented the court from making a judicial determination of those questions.

It is at this point that I must diverge from the majority's reasoning. To deny the petitioner the opportunity to obtain evidence that might exculpate him from a judgment of long imprisonment, is arbitrarily to deprive him of his rights under the pertinent directive. If the information is material or relevant, or if it is of such character as to demand its nondisclosure, adjudication of those questions is clearly a judicial function, not that of the administrative official who is subpoenaed to produce them. To deny the power of the court to make the determination is to usurp the judicial function. Such action, from time immemorial, as I have understood, has been held to thwart the division of powers contemplated by and expressed in our constitution. If we ever become so unfortunate as to have an administration so unprincipled in character, so ruthless, as to rob the courts of their functions and as to usurp judicial power, then we may well revert to the nefarious inquisitions of old or the abhorrent gestapo of a lately existent ruthless government. Thus, in *Duncan v. Connell, Laird & Co., Ltd.* (1942) A. C. 624, discussing the nature of the privilege to

withhold production of public documents on grounds of public interest, the English court said that upon objection to production of such documents, the ruling to be made involved a "decision of the judge". In *Zimmerman v. Poin-dexter*, 74 F. Supp. 933, the court said, in a similar situation, that it is a "judicial question for ultimate decision by the court." Holding that it is eminently appropriate that "relevant documents which elucidate the vital issues in the action, should not be withheld from the court," the opinion proceeds: "To rule otherwise, in the absence of controlling authority, would do violence to the court's duty to search for the truth and be inimical to the traditional concept of the subpoena duces tecum as a vehicle of proof in American jurisprudence." The language of Dean Wigmore in his work on Evidence, 3rd Ed., Secs. 2378a, 2379 is pertinent: "The truth cannot be escaped that a court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to . . . (administrative) officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control, if its applicability is left to the determination of the very official whose interest it may be to shield a wrongdoing under the privilege. Both principle and policy demand that the determination of the privilege shall be for the court; and this has been insisted upon by the highest judicial personages both in England and the United States."

Whatever the cause of the violation of the department's own directive, whatever may have occurred in the communications between its head and its subordinates to lead to misunderstanding and to what I take to be, an inadvertent error made by conscientious law abiding officials, I think it is clear that the court, deprived of the opportunity to exercise its judicial function, was perfectly justified in entering the order from which this appeal was taken.

I would affirm the judgment, but direct that appellant may purge himself completely by producing the documents subpoenaed, for the court's determination of the issues lodged in it by the directive.

And afterward, to-wit, on the twenty-fourth day of February, 1950, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Friday, February 24, 1950.

Before:

Hon. J. Earl Major, Chief Judge.
Hon. Philip J. Finnegan, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.

United States of America *ex rel.*

Roger Touhy,

Relator,

9916

vs.

Joseph E. Ragen, Warden, Illinois
State Penitentiary, Joliet, Illinois,

Respondent,

George R. McSwain,

Appellant.

Appeal from the
United States District
Court for the
Northern District
of Illinois, Eastern
Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed, and that this cause be, and the same is hereby, remanded to the said District Court with directions that the appellant be discharged from the custody of the Attorney General of the United States.

And afterward, to-wit, on the twenty-second day of March, 1950, the mandate of this Court issued to the United States District Court for the Northern District of Illinois, Eastern Division.

And afterward, to-wit, on the eleventh day of April, 1950, there was filed in the office of the Clerk of this Court a designation of record, which said designation is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

United States of America, <i>ex rel.</i>	}	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Roger Touhy,		
<i>Relator,</i>		
9916 <i>vs.</i>		
Joseph E. Ragen, Warden, Illinois State Penitentiary, Joliet, Illinois,		
<i>Respondent,</i>		
George R. McSwain,		
<i>Appellant.</i>		

DESIGNATION OF RECORD.

To: Honorable Kenneth J. Carrick, Clerk.

The Clerk is hereby directed to prepare certified copies of the following for transmittal to the Supreme Court of the United States as the record on Petition for Writ of Certiorari in the above entitled cause:

1. Record of proceedings in the District Court for the Northern District of Illinois, Eastern Division;
2. Order taking cause under advisement;
3. Opinion of the Court filed February 24, 1950;
4. Judgment on Opinion;
5. Reference to issuance of Mandate;
6. This Designation.

Robert B. Johnstone,
Howard B. Bryant,
Attorneys for Relator-Appellee.

Endorsed: Filed Apr. 11, 1950. Kenneth J. Carrick,
Clerk.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of papers filed and proceedings had, made in accordance with the designation of record filed in this Court on April 11, 1950, in:

Cause No. 9916.

United States of America, *ex rel.* Roger Touhy,
Relator,
vs.

Joseph E. Ragen, Warden, etc.,
Respondent,
George R. McSwain,
Appellant,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 17th day of April, A. D. 1950.

(Seal)

Kenneth J. Carrick,
*Clerk of the United States Court of
Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Clark took no part in the consideration or decision of this application.

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FILED

MAY 22 1950

CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1949 **1950**

No. **83**

UNITED STATES OF AMERICA, EX REL.,
ROGER TOUHY,

Petitioner,

vs.

JOSEPH E. RAGEN, WARDEN, ILLINOIS STATE PENITEN-
TIARY, JOLIET, ILLINOIS, AND GEORGE R. McSWAIN,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT AND BRIEF IN SUPPORT
THEREOF.**

EDWARD M. BURKE,
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1949.

No. _____

UNITED STATES OF AMERICA, *EX REL.*,
ROGER TOUHY,

Petitioner,

vs.

JOSEPH E. RAGEN, WARDEN, ILLINOIS STATE PENITEN-
TIARY, JOLIET, ILLINOIS, AND GEORGE R. McSWAIN,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT.**

Your Petitioner, Roger Touhy, Relator in the proceed-
ings below, prays for a Writ of Certiorari to review a deci-
sion and judgment of the United States Court of Appeals
for the Seventh Circuit entered February 24, 1950, revers-
ing a judgment order entered by the Honorable John P.
Barnes on June 2, 1949 finding George R. McSwain, Special
Agent, in Charge of the Chicago Office of the Federal
Bureau of Investigation of the Department of Justice of
the United States, guilty of contempt of court in refusing
to produce certain records in response to a subpoena
duces tecum and committing him to the custody of the
Attorney General until he shall obey the order of the
Court and produce the records (Rec. 159, 174).

OPINIONS BELOW.

The District Court rendered no formal opinion. Its judgment order appears in the record (Rec. 144, 145). The opinion of the United States Court of Appeals for the Seventh Circuit by Honorable J. Earl Major, Chief Judge with Honorable Philip J. Finnegan, Circuit Judge concurring and the dissenting opinion of Honorable Walter C. Lindley, Circuit Judge, appear in the Record (Rec. 159-173). The opinion is reported in 180 Fed. (2) 321.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The proceedings in the District Court were commenced by the filing of a Petition for Habeas Corpus on behalf of relator questioning the legality of an Illinois state court commitment under which he was held in the Illinois State Penitentiary at Stateville, Illinois. This petition, as subsequently amended, alleged that in the proceeding leading to petitioner's conviction and commitment, he was deprived of and denied the right to a fair trial guaranteed to him by section 1 of Amendment XIV to the Constitution of the United States, among other things in that the representatives of the State of Illinois conspired to and did bring about petitioner's conviction for an alleged crime (kidnapping for ransom) which he did not commit, by means of the procurement and production in the trial of said cause of perjured testimony as to the connection of the petitioner with the alleged crime of kidnapping one John Factor (Rec. 91, 92).

The State's Motion to Dismiss the Petition as Amended was overruled and a Writ of Habeas Corpus issued (Rec. 93, 94). Thereafter a Return (Rec. 94-97) and Traverse and Amended Traverse to the Return were filed (Rec. 104, 107, and 109). At this stage of the proceedings, a sub-

poena duces tecum was duly issued and served upon George R. McSwain, special agent in charge of the Chicago Office of the Federal Bureau of Investigation directing him to produce before the District Judge, certain records in his possession including, "specifically transcript, records, memoranda, and other data with respect to certain show-ups held in the offices of the Federal Bureau of Investigation, Chicago, Illinois, on or between the dates of July 19, to July 24, 1933 inclusive" (Rec. 113).

On June 1, 1949, the case having been continued to that date, George R. McSwain, who was present in Court in response to the subpoena, was requested to produce the documents therein requested (Rec. 115). At this point, the Honorable Otto Kerner, Jr., United States Attorney advised the Court that in compliance with Department of Justice Order Number 3229 and Supplement Number 2 dated June 6, 1947, the records were not produced and also apprised the Court of a letter received from the Attorney General of the United States, among other things stating (Rec. 116): "It is the Department's position that it should decline to produce the records in question."

Then followed extended colloquy in open court and chambers (Rec. 116-134) at the conclusion of which Respondent McSwain called as a witness, admitted service of the subpoena *duces tecum*, and in response to a question as to whether he had produced the documents in response to the subpoena, said that he had not produced the records and advised the Court as follows: "I must respectfully advise the Court that under instructions to me by the Attorney General, that I must respectfully decline to produce them in accordance with Department Rule No. 3229" (Rec. 135). Thereafter, respondent having persisted in his refusal to produce, the order here in question was entered, finding respondent guilty of contempt

of Court in refusing to produce the records referred to, and committing respondent to the custody of the Attorney General of the United States or his authorized representative for imprisonment until he shall obey the order of this Court and produce the records referred to in the subpoena *duces tecum* (Rec. 144, 145).

The decision of the Circuit Court of Appeals reversed the Order of commitment holding that Order Number 3229 of the Department of Justice prohibiting the production of documents was valid.*

JURISDICTION.

The jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code (28 United States Code, Section 1254 (1)). The Judgment of the Circuit Court of Appeals herein sought to be reviewed was entered February 24, 1950.

QUESTIONS PRESENTED.

The following questions are presented by the Record in this cause:

1. Whether Department of Justice Order 3229 prohibiting disclosure of Department Records even in response to a duly served subpoena *duces tecum* is valid.
2. Whether the Attorney General of the United States may make a conclusive determination not to produce records and his employees may lawfully decline to produce the same in response to a subpoena *duces tecum*.
3. Whether the Court of Appeals for the Seventh Cir-

* The majority opinion below also held that Supplement No. 2, waived the prohibition so far as tender for personal perusal of the Court was concerned, but Supplement No. 2 is not involved in the case, first because the Attorney General does not deem it a binding regulation, and second, because in fact no actual tender for the Court's personal perusal was made in this case. (See brief, p. 24.)

cuit erred in its judgment in reversing the judgment order of the District Court adjudging respondent McSwain guilty of contempt of court and committing him to the custody of the Attorney General until he produced the records in question.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Court of Appeals for the Seventh Circuit in this case has decided important questions of Federal law which have not been but should be settled by this Court.

Constitutional Provision Involved.

Article III Sec. 1 of the Constitution of the United States pertaining to the judicial power of the United States.

Statute Involved.

5 U. S. Code 22 (R. S. Sec. 161) which provides:

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers and property appertaining to it."

Department of Justice Order Involved.

Order No. 3229 promulgated by the Attorney General of the United States on May 2, 1939 (set forth in full Rec. p. 119) which among other things provides:

"Whenever a subpoena *duces tecum* is served to produce any of such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General will appear in Court in answer thereto and respectfully decline to produce the

records specified therein, on the grounds that the disclosure of such records is prohibited by this regulation."

Supplement No. 2 to order 3229 promulgated by the Honorable Tom C. Clark, Attorney General on June 6, 1947 and set forth in full (Rec. pages 120, 121).

This case presents squarely the question whether by his own rule and determination, the Attorney General of the United States can create a binding privilege with reference to documents admittedly material to the issues before the Court, which will effectively prohibit the production of such documents when duly subpoenaed by the District Court. The question is raised in a proceeding in which violations of substantial constitutional rights are alleged and in which it appears that the requested documents directly bear upon those violations.*

There has been no decision by this Court in which production of exculpatory evidence has been excused on the basis of an *ex parte* determination by the Department of Justice that such material was confidential and privileged. Whether a Department Head or any other member of the Executive Branch of the Government can effectively create such a privilege and whether the Courts are bound by the Executive determination not to produce, are highly important questions which have not and should be finally and conclusively determined by this Court.

WHEREFORE, Petitioner appends hereto his Brief, and

* Petitioner's conviction of the crime of kidnapping for ransom for which he was sentenced to 99 years in the penitentiary was procured largely on the basis of visual identification testimony of John Factor. (*People of the State of Illinois v. Roger Touhy, et al.*, 361 Ill. 332, 336.) Petitioner claimed in the District Court (Rec. 129) that at the show up before the Federal Bureau of Investigation, the records pertaining to which were the subject matter of the subpoena *duces tecum* in question, said Factor was unable to identify Petitioner. The United States Attorney's statement as to the contents of the records (Rec. 129) gives credence to this claim.

prays for the allowance of a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to the end that this cause may be decided upon review by this Court and that the judgment of said Court of Appeals may be reversed and the Order of the District Court may be affirmed, and for such further and other relief as to this Court may seem meet.

EDWARD M. BURKE,
ROBERT B. JOHNSTONE,
HOWARD B. BRYANT,
Attorneys for Petitioner.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1949.

No. _____

UNITED STATES OF AMERICA, EX REL.,
ROGER TOUHY,

Petitioner,

vs.

JOSEPH E. RAGEN, WARDEN, ILLINOIS STATE PENITEN-
TIARY, JOLIET, ILLINOIS, AND GEORGE R. McSWAIN,
Respondents.

**BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI.**

STATEMENT.

**(1) THE OPINIONS OF THE REVIEWING COURT AND THE
TRIAL COURT.**

The District Judge rendered no formal opinion. The majority and dissenting opinion of the Court of Appeals for the Seventh Circuit is in the Record (Rec. pp. 159-173), and is reported in 180 Fed. 2d 321.

(2) THE JURISDICTION OF THIS COURT.

It is submitted that this is an appropriate case for review under Section 1254 (1) of the Judicial Code (28 U. S. Code, Section 1254 (1)) and Rule 38, Par. 5 (b) of this Court which falls within the condition indicated by the Rule as a ground for the exercise of the Court's discretion:

(1) "Where a Circuit Court of Appeals has * * * decided an important question of Federal Law which has not been, but should be settled by this Court."

Whether Department of Justice Order Number 3229 prohibiting disclosure of department records is valid; and whether the Attorney General of the United States may make a conclusive determination not to produce records, and his employees may lawfully decline to produce the same in response to a subpoena *duces tecum*, are important questions of Federal Law which have not been, but should be settled by this Court.

(3) STATEMENT OF THE CASE.

A subpoena *duces tecum* requiring the production of certain records including specifically the records of show-ups held in the offices of the Federal Bureau of Investigation in Chicago, Illinois, on or between the dates of July 19 and July 24, 1933, inclusive, was duly served upon respondent George R. McSwain who was Special Agent in Charge of the Federal Bureau Investigation in Chicago, Illinois (Rec. 113, 114).

At the time this subpoena was served, petitioner's habeas corpus proceeding was pending in the District Court, a writ of habeas corpus had been issued and the cause was at issue upon the petition as amended, return, and traverse to the return as amended (Rec. 91-112). No

question was raised in the District Court as to the records being in the possession and custody of respondent McSwain. No question was raised as to the validity of the service. When called upon to produce the records, Respondent McSwain flatly and unqualifiedly refused production basing his refusal upon instructions to him by the Attorney General in accordance with Department Rule 3229 (Rec. 135).

There was some colloquy between the United States Attorney and counsel which resulted in differing interpretation as to the effect and applicability of Supplement Number 2 to Order 3229 of the Department of Justice (Rec. 114-134). This is fully discussed in Point IV of our Argument. Excepting for this point (which we believe, in any event, is not material since the Department of Justice does not regard Supplement Number 2 as a binding regulation) the sole question presented to the District Court and to the Court of Appeals was whether on the undisputed facts, Respondent McSwain in reliance upon Order 3229 and the instructions from the Attorney General could properly refuse to produce the records when so directed by the Court.

(4) SPECIFICATIONS OF ERRORS.

Petitioner submits that the Court of Appeals for the Seventh Circuit erred in the following respects:

(A) In holding that Department of Justice Order 3229 was valid;

(B) In reversing the Judgment Order of the District Court committing respondent McSwain to the custody of the Attorney General until the records in question shall have been produced.

SUMMARY OF ARGUMENT.

I.

Department of Justice Order Number 3229, and the Action of That Department Under It in This Case Constituted an Unwarranted Invasion of the Judicial Functions of the Courts.

Dissenting opinion of Justice Brandeis in *Myers v. United States*, 272 U. S. 52, 293.

Story Commentaries on the Constitution of the United States (1833) Vol. II, pages 2, 6, 23.

II.

This Court Has Refused to Accord Departmental Immunity to Executive Officials and Has Recognized the Impropriety of Denying Access to Exculpatory Material on the Mere Assertion of Executive Privilege.

Marbury v. Madison, 1 Dallas 267 at p. 268, 1 Cranch, 137.

United States v. Aaron Burr, 25 Fed. Cases 1-207, Fed. Cases 14692 (d), 14693, 14694.

8 Wigmore on Evidence, 3rd Ed., Sections 2378A, 2379.

III.

The Decision of This Court in *Boske v. Comingore*, 177 U. S. 459 Does Not Sustain the Validity of Order 3229 in the Light of the Encroachment Upon Judicial Powers Here Involved.

Boske v. Comingore, 177 U. S. 459 (Distinguished).

Revised Statutes, Sec. 161, 5 U. S. Code 22.

IV.

Supplement No. 2 to Order 3229 Providing, Among Other Things for a Tender to the Court Is Not a Binding Regulation and, Moreover, Is Not Applicable on the Facts of the Case.

United States of America v. Cotton Valley Operators, et al., No. 490, October 1949 term United States Supreme Court.

ARGUMENT.

I.

Department of Justice Order Number 3229, and the Action of That Department Under It in This Case Constituted an Unwarranted Invasion of the Judicial Functions of the Courts.

We respectfully submit, that Order No. 3229, as utilized by the Department of Justice in this case, represents an encroachment upon and invasion of the essential judicial power, which if permitted to stand, constitutes a threat to the separation of powers—executive, legislative, and judicial—which forms the basic policy underlying the framework of our government.

If the executive may say “thou shall not” to the courts with respect to the enforcement of the court’s own processes in an inquiry properly within the Court’s jurisdiction, then we no longer have an independent judiciary, the establishment of which was a *sine qua non* in the minds of the founders of our Republic. This is particularly true since, of the three, as has been pointed out, the judiciary is the weakest and most vulnerable of the branches of government and the challenge to liberty which this encroachment represents, may not be taken lightly.

We respectfully call to the attention of the Court and ask that it be carefully considered, the following commentary by Mr. Justice Story, in his Commentaries on the Constitution of the United States (1833) (Vol. II, p. 23):

“Indeed, the judiciary is naturally, and almost necessarily (as has been already said) the weakest department (citing Montesquieu, Spirit of Laws, B 11, ch. 6). It can have no means of influence by patronage. Its

powers can never be wielded for itself. It has no command over the purse or the sword of the nation. It can neither levy taxes, nor appropriate money, nor command armies, or appoint to offices. It is never brought into contact with the people by the constant appeals and solicitations and private intercourse, which belong to all the other departments of government. It is seen only in controversies, or in trials and punishments. Its rigid justice and impartiality give it no claims to favour however they may to respect. It stands solitary and unsupported, except by that portion of public opinion which is interested only in the strict administration of justice. * * * It would seem, therefore, that some additional guards would, under such circumstances, be necessary to protect this department from the absolute dominion of the others. Yet rarely have any such guards been applied; and every attempt to introduce them has been resisted with a pertinacity, which demonstrates how slow popular leaders are to introduce checks on their own power; and how slow the people are to believe, that the judiciary is the real bulwark of their liberties."

If the Courts will not protect their own power, certainly no one is going to do it for them and the people, where individual liberty is at stake, are the ones bound to suffer.

Nothing is more fundamentally a part of the judicial power, than the right of a Court to compel obedience to its own process, orders and decrees. This is one of the basic and inherent attributes of a Court. It is equally clear that the determination whether in any given case reasons of public interest require non-disclosure of information, is and must be a judicial determination. Order No. 3229, as acted upon by the Department of Justice in this case, and as construed by the majority of the Court of Appeals in the decision sought to be reviewed, prohibits the Court from exercising its judicial powers and from making the determination involved.

The encroachment directly does violence to the basic constitutional principle of separation of powers. Mr. Justice Story, in his Commentaries on the Constitution of the United States, thus states the principle (Vol. II, p. 2):

"In the establishment of a free government, the division of the three great powers of government, the executive, the legislative, and the judicial, among different functionaries, has been a favorite policy with patriots and statesmen. It has by many been deemed a maxim of vital importance, and that these powers should forever be kept separate and distinct. . . ."

"Montesquieu seems to have been the first, who, with a truly philosophical eye, surveyed the political truth involved in this maxim, in its full extent, and gave to it a paramount importance and value. As it is tacitly assumed, as a fundamental basis in the constitution of the United States, in the distribution of its powers, it may be worth inquiry, what is the true nature, object and extent of the maxim and of the reasoning by which it is supported. The remarks of Montesquieu on the subject will be found in a professed commentary upon the constitution of England (Montesquieu, B. 11 ch. 6). 'When,' says he, 'the legislative and executive powers are united in the same person, or in the same body of Magistrates, there can be no liberty, because apprehension may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again there is no liberty if the judiciary power be not separated from the legislative and executive'."

Story also quotes from The Federalist, No. 47, as follows (p. 6):

"And the Federalist has, with equal point and brevity, remarked that the accumulation of all powers legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective may be justly pronounced the very definition of tyranny."

Mr. Justice Brandeis, in the course of his dissenting opinion in *Myers v. United States*, 272 U. S. 52, said this with respect to the doctrine of the separation of powers (p. 293):

“The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.”

II.

This Court Has Refused to Accord Departmental Immunity to Executive Officials and Has Recognized the Impropriety of Denying Access to Exculpatory Material on the Mere Assertion of Executive Privilege.

The power of this Court to require employees of the Executive Branch to comply with its processes was squarely before the Court in *Marbury v. Madison*, 1 Cranch 137 (1803). This Court's decision on that branch of the case leaves no room to doubt that this Court and the Federal Courts generally do have the power to determine whether in any given case an executive privilege exists and to enforce compliance upon the basis of its determination. The issue arose upon the objection of the Attorney General (formerly Acting Secretary of State) and of certain clerks to testifying in the case. The manner in which this Court (before whom the matter was pending on an original petition for Mandamus) handled the situation is thus summarized (1 Dallas, 3rd Edition (1854), at p. 268):

“Mr. Jacob Wagner and Mr. Daniel Brent, who had been summoned to attend the Court and were required

to give evidence, objected to be sworn, alleging that they were clerks in the Department of State, and not bound to disclose any facts relating to the business or transactions of the office.

"The Court ordered the witnesses to be sworn and their answers taken in writing, but informed them that when the questions were asked they might state their objection to answering each particular question, if they had any.

"Mr. Lincoln, who had been the Acting Secretary of State, when the circumstances stated in the affidavit occurred, was called upon to give testimony. He objected to answering. The questions were put in writing.

"The Court said there was nothing confidential required to be disclosed. If there had been, he was not obliged to answer it, and if he thought that anything was commanded to him confidentially, he was not bound to disclose, nor was he obliged to state anything that would criminate himself."

After the court's ruling, Mr. Lincoln took the stand and as appears from the report of the proceedings in 1 Cranch 137, at p. 144 answered all questions put to him, except one in connection with which he professed lack of knowledge.

A situation similar to that at bar was also before Chief Justice Marshall, sitting as a Circuit Judge, in *United States v. Aaron Burr*, 25 Fed. Cases 1-207, Fed. cases 14692d, 14693, 14694. There counsel for the defendant subpoenaed certain correspondence between President Jefferson and General Wilkinson which was in the President's possession. Eventually the correspondence was produced with certain material deemed by the President to be privileged deleted. Apparently counsel for the defendant did not persist with respect to the deleted portions. Of interest are the Chief Justice's remarks in the course of the proceedings (25 Fed. Cases at p. 192):

"Yet it is a very serious thing, if such letter should

contain any information material to the defence, to withhold from the accused the power of making use of it. It is a very serious thing to proceed to trial under such circumstances. I cannot precisely lay down any general rule for such a case. Perhaps the court ought to consider the reasons which would induce the president to refuse to exhibit such a letter as conclusive on it, unless such letter could be shown to be absolutely necessary in the defence. The president may himself state the particular reasons which may have induced him to withhold a paper, and the court would unquestionably allow their full force to those reasons. At the same time, the court could not refuse to pay proper attention to the affidavit of the accused. But on objections being made by the president to the production of a paper, the court would not proceed further in the case without such an affidavit as would clearly shew the paper to be essential to the justice of the case. On the present occasion the court would willingly hear further testimony on the materiality of the paper required, but that is not offered.

"In no case of this kind would a court be required to proceed against the president as against an ordinary individual. The objections to such a course are so strong and so obvious, that all must acknowledge them. But to induce the court to take any definite and decisive step with respect to the prosecution, founded on the refusal of the president to exhibit a paper, for reasons stated by himself, the materiality of that paper ought to be shown. In this case, however, the president has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by himself, not by another for him. Of the weight of the reasons for and against producing it, he is himself the judge. It is their operation on his mind, not on the mind of others, which must be respected by the Court. They must therefore be approved by himself, and not be the mere suggestions of another for him. It does not even appear to the court that the president does object to the production of any part of this letter. The objection,

and the reasons in support of the objection, proceed from the attorney himself, and are not understood to emanate from the president. He submits it to the discretion of the attorney. Of course, it is to be understood that he has not objections to the production of the whole, if the attorney has not. Had the president, when he transmitted it, subjected it to certain restrictions, and stated that in his judgment the public interest required certain parts of it to be kept secret, and had accordingly made a reservation of them, all proper respect would have been paid to it; but he has made no such reservation. As to the use to be made of the letter, it is impossible that either the court or the attorney can know in what manner it is intended to be used. The declarations therefore made upon that subject can have no weight. Neither can any argument on its materiality or immateriality drawn from the supposed contents of the parts in question. The only ground laid for the court to act upon is the affidavit of the accused; and from that the court is induced to order that the paper be produced, or the cause be continued. In regard to the secrecy of these parts which it is stated are improper to give out to the world, the court will make any order that may be necessary.

"I do not think that the accused ought to be prohibited from seeing the letter; but, if it should be thought proper, I will order that no copy of it be taken for public exhibition, and that no use shall be made of it but what is necessarily attached to the case. After the accused has seen it, it will yet be a question whether it shall go to the jury or not. That question cannot be decided now, because the court cannot say whether those particular passages are of the nature which are specified. All that the court can do is to order that no copy shall be taken; and if it is necessary to debate it in public, those who take notes may be directed not to insert any part of the arguments on that subject. I believe, myself, that a great deal of the suspicion which has been excited will be diminished by the exhibition of this paper."

It is apparent from the tenor of Chief Justice Marshall's remarks, that although the Court was obviously reluctant to force the issue to its ultimate conclusion, even with respect to the Chief Executive the Court unquestionably had the power to do so. It is also significant, we believe, that Chief Justice Marshall quite apparently felt that regardless of what might have been done with respect to making the letter a matter of public record, the defendant had a right to see it.

Wigmore on Evidence, 3rd Edition, Section 2379 (p. 799) strongly asserts that the Court must not abdicate its inherent function of determining the facts upon which the admissibility of evidence depends. The basic reasons for this position were so well stated in the argument of Mr. Botts in the *Burr* case (as set forth in Wigmore (3rd Edition), Vol. VIII, Sec. 2378a, p. 796n) that we here repeat them:

"I can never express, in terms sufficiently strong, the detestation and abhorrence which every American should feel towards a system of state secrecy. . . . In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of the United States have a right to know every public act, everything that is done in a public way by their public functionaries. . . .

"I will again predict, that if a secret inquisitorial tribunal be established by your decision now . . . if you determine that we be deprived of the benefit of important written or oral evidence by the introduction of this state secrecy, you lay, without intending it, the foundation for a system of oppression. If these things be established, to go down to posterity as precedents, the inevitable consequences will be that, whenever any man in the United States becomes an object of the vengeance or jealousy of those in power, he may easily be ruined. A wicked executive power will have

nothing to do to effect this destruction but to foment divisions in this country, to encourage and excite accusations by its officers, to deny the use of all public documents that may tend to the justification of the accused, or to render the attainment of exculpatory evidence dependent on the arbitrary whim of its prosecuting officers, and he will be condemned to sink without the smallest effectual resistance."

III.

The Decision of This Court in *Boske v. Comingore*, 177 U. S. 459 Does Not Sustain the Validity of Order 3229 in the Light of the Encroachment Upon Judicial Powers Here Involved.

The majority opinion in the Court below felt that the decision of this Court in the case of *Boske v. Comingore*, 177 U. S. 459, was conclusive with respect to the validity of Order 3229. We respectfully submit that the facts in the *Boske* case and the issues presented to this Court in that case do not justify such a conclusion.

In the *Boske* case this Court had before it the validity of Treasury Department Rule X and held that the regulation prohibiting disclosure of tax data obtained by Collectors of Internal Revenue, was authorized by Section 161 of the Revised Statutes (5 U. S. Code 22), the same Statute relied upon to sustain the validity of Order 3229. That Statute is a "Housekeeping Statute". It authorizes the heads of the various departments to prescribe regulations *not inconsistent with law for the custody, use and preservation of the records, papers and property pertaining to his department*. This Court held that under the circumstances existing in the *Boske* case the Treasury Department regulation was not inconsistent with law within the meaning of the Statute.

In the *Boske* case an employee of the United States had been adjudicated in contempt of a State Court for his refusal to produce tax records sought by State taxing bodies to aid them in the collection of State taxes. He was released upon a writ of habeas corpus issued by the United States District Court and the case was heard in this Court on appeal from the order discharging the collector from custody.

We concede that within their spheres the State Courts are every bit as much a part of the judicial framework of our government as are the United States District Courts, but in considering what issues were actually decided in the *Boske* case it cannot escape attention that the matter was presented to this Court in an atmosphere colored by protection of Federal Government officials against action at the behest of state taxing authorities and that no problem of executive versus judicial power and authority was present in the case or in the minds of the Court or parties at the time it was presented.

Certainly this Court, in the *Boske* case did not purport to lay down any definitive rule of law prescribing the respective spheres of action of the Courts and the Executive Department. In considering the breadth to be accorded the *Boske* decision, the effect of the dangers to the revenue collecting facilities of the United States in the situation there present cannot be overlooked. If data furnished to United States tax collectors were immediately available to all state taxing agencies, a reluctance to furnish that data was certainly to be anticipated. No such policy element is present in this case.

Boske v. Comingore, 177 U. S. 459, did not decide that a person whose liberty was either in jeopardy or restrained might be deprived of exculpatory evidence at the will of the Department of Justice. Apparently for this reason the

great bulk of the recently decided cases in the lower Courts, by use of the fiction of waiver or otherwise have made such evidence available, despite the government's claim of privilege. A number of these are collected in a foot note.*

Whether the Department of Justice has any such absolute privilege to refuse to divulge records containing exculpatory material in a proceeding involving alleged violations of constitutional rights, is the question presented in this case, and is, we respectfully submit, an important question which has not been and should be decided by this Court.

IV.

Supplement No. 2 to Order 3229 Providing, Among Other Things for a Tender to the Court Is Not a Binding Regulation and, Moreover, Is Not Applicable on the Facts of the Case.

The Court of Appeals in its decision in this case, after holding that Order 3229 was valid and created a privilege of non-disclosure, proceeded to hold that Supplement Number 2 to this Order waived this privilege insofar as a tender of records subpoenaed to the Court for the

* *Crosby v. Pacific S. S. Line*, 133 Fed. (2) 470 (1943) (C. C. A. 9th); *United States v. Grayson*, 166 Fed. (2) 863 (1948) (C. C. A. 2nd); *United States ex rel. Schlueter v. Watkins*, 67 Fed. Supp. 556 (1945) (D. C. N. Y.); *Sorrentino v. United States*, 163 Fed. (2) 627 (1947) (C. C. A. 9th); *Bankline v. United States*, 163 Fed. (2) 133 (1947) (C. C. A. 2d); *United States v. Beckman*, 155 Fed. (2) 580 (1946) (C. C. A. 2d); *United States v. Krulewitch*, 145 Fed. (2) 76 (1945) (C. C. A. 2d); *United States v. Cohen*, 145 Fed. (2) 82 (1945) (C. C. A. 2d); *United States v. Andolschek*, 142 Fed. (2) 503 (1944) (C. C. A. 2nd); *United States v. General Motors Corp.* (D. C. Ill., 1942), 2 F. R. D. 528; *Bowles v. Ackerman* (D. C. N. Y., 1945), 4 F. R. D. 260; *O'Neill v. United States* (D. C. Pa., 1948), 79 Fed. Supp. 827, 830; *Zimmerman v. Poindexter* (D. C. Hawaii, 1947), 74 Fed. Supp. 933, 936.

Court's personal perusal was concerned. The Court of Appeals then went on to hold that on the facts of this case, since the Court had stated it would not look at the documents in question without the assistance of counsel, the waiver created by Supplement Number 2 did not apply.

We believe the Court of Appeals erroneously interpreted the occurrences in the Trial Court on this question of tender, but entirely aside from this, we wish to point out that it is the official position of the Department of Justice that Supplement Number 2 is not, in any event, a binding regulation and is merely for the private instruction of United States attorneys. A full statement of the Department's position with respect to Supplement Number 2 appears on page 5 of the Reply Brief for the United States in the case of *United States of America v. Cotton Valley Operators, et al.*, No. 490, in the October 1949 term of this Court as follows:

"Supplement No. 2, as well as the other supplements or circulars issued by the Department of Justice in connection with Order No. 3229, have no relevancy to this case. The supplement is solely for the private instruction of United States attorneys. It is not a public regulation. Its purpose is to inform United States attorneys of procedure to be followed in the absence of specific instruction from the Attorney General. In no sense does it bind or obligate the Attorney General. * * * That supplement does not, by its literal terms or in legal effect, limit the Attorney General's right to appear and claim the privilege against disclosure."

The occurrences on the basis of which the Court of Appeals held no waiver of the absolute privilege conferred by Order 3229 existed are the following:

In the course of the colloquy at the time production of the records was requested, the United States attorney stated (Rec. 123):

"It is a matter of discretion with the Court to ascertain whether or not they are material and I will provide them for the Court's personal perusal". To this the Court replied: "What can I do in looking at them without counsel looking at them? He cannot make a record on that." Whereupon the United States Attorney stated: "Well, I am standing on my instructions here that I cannot produce them on the orders of the Attorney General."

Shortly thereafter the Court stated (Rec. 125): "I cannot believe that public security is going to be adversely affected by their seeing those papers."

At this point, the United States Attorney stated: "May I produce these documents before Your Honor in Chambers with counsel present and I shall read them."

The matter was then continued until two o'clock and at that time the United States Attorney appeared in chambers without the documents and when reminded by the Court of his offer to submit the documents in chambers with counsel present, the United States Attorney stated (Rec. 134): "I did not intend actually to bring the reports in because I was still under the orders of the Department."

This was followed by calling agent McSwain to the stand in open Court, at which time he made an unqualified refusal to produce based on Order 3229 (Rec. 135).

On these facts we respectfully submit there was no such tender of the material to the Court for its personal perusal as the majority opinion in the Court of Appeals indicates, and for this reason, Supplement Number 2 which contemplates such a tender, is not here involved.

We therefore respectfully submit that this Court should grant the Writ of Certiorari here prayed for and reverse the judgment of the United States Court of Appeals for the Seventh Circuit and affirm the judgment order of the United States District Court.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1950.

No. 83

UNITED STATES OF AMERICA, EX REL.,
ROGER TOUHY,

Petitioner,

vs.

• JOSEPH E. RAGEN, WARDEN, ILLINOIS STATE
PENITENTIARY, JOLIET, ILLINOIS, AND
GEORGE R. McSWAIN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

Opinion Below.

The majority and dissenting opinions of the United States Court of Appeals for the Seventh Circuit (Rec. 159-173) are reported in 180 Fed. 2nd 321. The District Court rendered no formal opinion. Its judgment order appears in the record. (Rec. 144-145.)

Jurisdiction.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered February 24, 1950. The Petition for a Writ of Certiorari was filed on May 22, 1950, and was granted on October 9, 1950. (Rec. 177.) The jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code. (28 United States Code, Section 1254 (1).)

Statement.

This proceeding was instituted by Roger Touhy who filed a Petition for Habeas Corpus in the United States District Court for the Northern District of Illinois, Eastern Division, on April 2, 1948, questioning the legality of a commitment pursuant to judgment and sentence of the Criminal Court of Cook County, Illinois under which he was being held in the Illinois State Penitentiary at Stateville, Illinois.

This Petition, as subsequently amended alleged that in the proceedings leading to petitioner's conviction and commitment, he was deprived of and denied the right to a fair trial guaranteed to him by Section 1 of Amendment XIV to the Constitution of the United States, among other things in that the representatives of the State of Illinois conspired to and did bring about petitioner's conviction for an alleged crime (kidnapping for ransom) which he did not commit, by means of the procurement and production in the trial of said cause of perjured testimony as to the connection of the petitioner with the alleged crime of kidnapping one John Factor. (Rec. 91, 92.)

By an Amendment filed May 31, 1949, the conspiracy charged was enlarged to include the agents of the Federal Bureau of Investigation and other attorneys, agents, and servants of the United States. (Rec. 109-112.)

A Writ of Habeas Corpus was issued by the District Court (Rec. 93-94) and a Return (Rec. 94-97), and Traverse and Amended Traverse to the Return were filed. (Rec. 104, 107, and 109.) At this stage of the proceedings, a subpoena *duces tecum* was duly issued and served upon George R. McSwain, special agent in charge of the Chicago Office of the Federal Bureau of Investigation directing him to produce before the District Judge, certain records in his possession including, "specifically transcript, records, memoranda, and other data with respect to certain show-

ups held in the offices of the Federal Bureau of Investigation, Chicago, Illinois, on or between the dates of July 19 to July 24, 1933, inclusive.” (Rec. 113.)

On June 1, 1949, the case having been continued to that date, George R. McSwain, who was present in Court in response to the subpoena, was requested to produce the documents therein requested. (Rec. 115.) At this point, the Honorable Otto Kerner, Jr., United States Attorney advised the Court that in compliance with Department of Justice Order Number 3229 and Supplement Number 2 dated June 6, 1947*, the records were not produced and also apprised the Court of a letter received from the Attorney General of the United States, among other things stating (Rec. 116):

“It is the Department’s position that it should decline to produce the records in question.”

In the course of the ensuing argument and colloquy (Rec. 114-126), Mr. Kerner urged the necessity of a determination as to the materiality of the subpoenaed documents, at which point the following transpired (Rec. 123):

By the Court: I cannot determine whether they are material until I see them.

By Mr. Kerner: That is correct, sir. That is the point upon which we argue.

By the Court: Now what? Is this relator to be deprived of having his counsel look at them?

By Mr. Kerner: I would undertake to say this—

By the Court: I say, is he to be deprived of that?

By Mr. Kerner: It is a matter of discretion with the Court to ascertain whether or not they are material, and I will provide them for the Court’s personal perusal.

By the Court: What can I do in looking at them without counsel looking at them? He cannot make his record on that.

By Mr. Kerner: Well, I am standing on my instructions here that I cannot produce them, on the orders of the Attorney General.

* For the convenience of the Court, these orders are set forth in full in an Appendix to this Brief.

The argument in open court concluded with a ruling by the court that Regulation Number 3229 as drafted is broader than the Statute permits. The court's remarks in full, together with Mr. Kerner's suggestion as to production of the documents in chambers being quoted in a footnote.* Thereafter, a recess as to this matter was taken until two o'clock P. M. (Rec. 126) at which time the United States Attorney appeared in chambers without the documents, stating, "I am still under orders not to actually produce the documents." (Rec. 127.)

In the course of the proceedings in chambers, counsel for the relator stated his feeling "That the proper thing to do would be to permit the court to examine these things without any of us" to which the court stated, "I don't want to

* By the Court: I am of the opinion that the regulation as drafted is broader than the statute permits, because the statute provides that these regulations shall only be valid to the extent that they are "consistent with law".

Now I cannot believe that any department head, no matter how exalted he may be, can say to the courts that the records of his department may not be available to the investigation of questions heard in the courts. That cannot be true. And whether or not these particular papers in question here are material, I don't know. But parties to this proceeding have a right to have somebody other than the Department determine that question.

I would be very glad if this Court were not called upon to determine it, but apparently it is. And I want to proceed to determine that question. I want the advice of counsel in respect of my determination of it. I cannot look at these papers without the advice of counsel, without counsel advising me in what particular they may or may not be material. I want the advice of counsel for the relator, and I want the advice of counsel for the respondent. They are all reputable members of the Bar and officers of the Court.

I cannot believe that public security is going to be adversely affected by their seeing those papers.

Now, howsoever you want to meet that question is all right with me. I am ready to rule on it. I want to rule effectively; I don't want to say, "Please do this." If you can suggest a method whereby I can rule effectively I will be very glad to have it.

By Mr. Kerner: Your Honor, I have a suggestion. May I produce these documents before your Honor in chambers, with counsel present, and I shall read them?

see them without counsel." (Rec. 131.) Mr. Kerner also stated orally the nature of some of the information in the Reports. (Rec. 131-132.)

The colloquy in chambers terminated when, after the court stated he must have misunderstood Mr. Kerner's proposal, Mr. Kerner stated (Rec. 134):

"I did not intend actually to bring the reports in because I was still under the orders of the department."

Thereupon Respondent McSwain was called as a witness, admitted service of the subpoena *duces tecum*, and in response to a question as to whether he had produced the documents in response to the subpoena, said that he had not produced the records and advised the Court as follows:

"I must respectfully advise the Court that under instructions to me by the Attorney General, that I must respectfully decline to produce them in accordance with Department Rule No. 3229." (Rec. 135.)

Thereafter, respondent having persisted in his refusal to produce, the order here in question was entered, finding respondent guilty of contempt of Court in refusing to produce the records referred to, and committing respondent to the custody of the Attorney General of the United States or his authorized representative for imprisonment until he shall obey the order of the Court, or until discharged by due process of law. (Rec. 144, 145.)

The opinion of the Court of Appeals held that Department of Justice Order No. 3229 was valid and confers upon the Department of Justice the privilege of refusing to produce unless there has been a waiver of such privilege (Rec. 168), and then proceeded to hold that under the circumstances of this case such waiver of privilege as is set forth in Supplement No. 2 to Order 3229 did not exist because the Court was unwilling to examine the material for the purpose of determining its materiality.

and whether it was in the best public interest that such information should be disclosed. (Rec. 171.) The dissenting opinion of Circuit Justice Lindley adopted the view that the District Court was "deprived of the opportunity to exercise its judicial function and was perfectly justified in entering the order from which the appeal was taken." (Rec. 173.)

Specification of Assigned Errors to be Argued.

Petitioner submits that the Court of Appeals for the Seventh Circuit erred in the following respects:

(A) In holding that Department of Justice Order 3229 was valid;

(B) In reversing the Judgment Order of the District Court committing respondent McSwain to the custody of the Attorney General until the records in question shall have been produced.

SUMMARY OF ARGUMENT.

I.

This case squarely presents a question of invasion of the judicial functions of the courts involving the application of fundamental concepts of individual liberty.

A. The tender or proffer to the court was limited to the question of materiality only. Respondent's refusal to produce was absolute, and based solely on Order No. 3229. The department's position is supportable only on the theory that the executive has an absolute privilege to refuse production of subpoenaed records with a concomitant discretion to waive that privilege—a theory inconsistent with a Constitutionally independent judiciary.

B. Two aspects of the exercise of judicial power are here involved; (1) The determination of whether public interest or security demanded non-disclosure, an opportunity to make which was denied the district court, and (2) The determination of the materiality of the subpoenaed records, in the making of which a court is inherently entitled to the advice of counsel. Long range protection of the essential judicial functions may well warrant the risk of occasional rash disclosure involved in permitting counsel full participation in the public interest determination; but absent this problem there exists no reason to vary traditional judicial procedure merely because the government, and not a private party, is the possessor of the records sought.

If any individual regardless of his station is to be deprived of alleged exculpatory material at the whim of the Executive or a subordinate of his in a proceeding involving constitutional rights the fundamental American principles of individual liberty may well be in jeopardy.

II.

Department of Justice Order 3229 as utilized by the Department of Justice in this case, is inconsistent with law being an encroachment upon the judicial power vested in the courts by Article III, Section 1 of the Constitution of the United States.

The doctrine of separation of powers was adopted by the convention of 1787 to preclude the exercise of arbitrary power (dissenting opinion of Mr. Justice Brandeis in *Myers v. United States*, 272 U. S. 52 (293). This Court in *Marbury v. Madison*, 1 Cranch 137 (1803) (1 Dallas, 3rd Edition (1854), 267, 268) established the power in the Courts to enforce compliance with its processes as against a claim of Executive privilege. Department of Justice Order 3229 usurps to the Executive the judicial function of determining the facts upon which the admissibility of evidence depends and is therefore inconsistent with law and invalid when tested in the light of the Constitutional principle of separation of powers.

III.

The decision of this Court in *Boske v. Comingore*, 177 U. S. 459, does not sustain the validity of Order 3229 in the light of the encroachment upon judicial powers here involved.

This Court in the *Boske* case was concerned with the limited problem of protecting an executive employee from the action of a state seeking to compel production of tax records. This Court was not there concerned with the rights of an individual asserting Constitutional guarantees and that decision should not be regarded as laying down a definitive rule of law establishing an absolute executive privilege. Particularly is this true in the light of the present vast expansion of the functions, offices, and agencies of the executive branch of the government.

ARGUMENT.

I.

This Case Squarely Presents a Question of Invasion by the Executive of the Judicial Function of the Courts Involving the Application of Fundamental Concepts of Individual Liberty.

(A)

As appears from the ruling of the District Court (Rec. 124, Footnote p. 4, *supra*), that court clearly had in mind determining the basic question of executive versus judicial power. Circuit Judge Lindley in his dissenting opinion also took this view of the problem.

The subpoenaed documents never were in court or chambers. Respondent McSwain's refusal to produce while on the witness stand was absolute, and was based on Order 3229,* not on Supplement Number 2* to that order. Supplement No. 2, among other things, expressly provides that "it is not necessary to bring the required documents into the court room and on the witness stand when it is the intention of the officer or employee to comply with the subpoena by submitting the regulation of the Department (Order No. 3229) and explaining that he is not permitted to show the files." (Rec. 121.)

Also, in the instant case, there never was an actual proffer or submission of the documents to the court for a determination of the question of public interest involved. The United States Attorney's tender (Rec. 123) was, advisedly or not, limited solely to the question of materiality. On

* For the convenience of the Court, these orders are set forth in full in an Appendix to this Brief.

that question as distinct from the question of public interest, the court, if it was to make a proper ruling was entitled to the advice of counsel; and the relator was entitled to make a record in connection with that determination.

It is respectfully submitted that on the basis of the facts as they occurred in the trial court, notwithstanding the willingness of counsel for the relator to let the court alone determine the propriety of production, the Attorney General and his agents did arrogate to themselves the absolute right to determine what should or should not be produced in response to the court's subpoena, and this action involved the exercise of the judicial function which always has resided, and under the Constitution, must reside with the courts.

The Department of Justice has been steadfast in the assertion of its right to make the final and conclusive determination of the question of production. In the Petition for a Writ of Certiorari in this case, this Court was referred to the statement of the Department's position appearing on page 5 of the Reply Brief for the United States in the case of *United States of America v. Cotton Valley Operators, et al.*, 339 U. S. 940. (Petition for Cert., p. 25.) The position there taken was reasserted in the Government's Brief in Opposition filed in this case. (Opp. Br., (1).) That Brief cited only Section 161 of the Revised Statutes and Department of Justice Order 3229. It did not cite, nor treat in the text as a valid and binding regulation, Supplement No. 2.

The Department obviously regards the tender contemplated by Supplement No. 2 as involving a discretionary waiver of the executory privilege available to the Department. We respectfully submit that this position is insupportable except on the theory that the Executive does have an absolute right to make the final binding determination whether to disclose material when it is duly subpoenaed by

court processes, and whether such an absolute privilege exists when excul tory material is sought by one who alleges that he is being detained in violation of his constitutional rights, is we submit the sole question presented for determination in this case.

(B)

Two distinct aspects of the exercise of judicial power are here involved. On the question of public security, it may be well that counsel, as distinguished from the court, should not be permitted to examine the requested documents providing the Department has first made a showing that public interest indeed might be seriously affected by the disclosure of the particular material.* In such case, the court, in the exercise of its judicial function could well determine against disclosure. This was not, however, the view of the District Court in this case. It is apparent from the court's comments that while the occasion was limited to the problem of materiality, the District Court regarded the members of its bar as an integral functioning part of the court, and as such, to be trusted to the same degree as the court itself in connection with full participation in both determinations.

In the interest of avoiding the accumulation of absolute power in any one functionary in order that fundamental liberties of the individual may be preserved at all costs,

* The only security reason advanced by the United States Attorney for non-disclosure was a general statement that death might come to an informer if the reports were divulged. The public policy respecting disclosure of informers has been recognized by this Court as subject to the qualification "unless essential to the defense, as, for example, where this turns upon an officer's good faith". (*Scher v. United States*, 305 U. S. 251, 254) The same qualification of necessity must be applied where a prisoner's liberty turns upon that same good faith. The District Court's comment, "I cannot believe the public security is going to be adversely affected by their seeing those papers", (Rec. 125) was therefore warranted on the facts as presented to the Court.

there is much to be said for the District Court's view. So long as there is a voice to be raised in protest against usurpation of power, the democratic processes, contemplated by our form of government, will continue to function. This, of necessity, involves implicit trust in all members of the bar, not government attorneys alone. If attorneys are indeed officers of the court, idealistic though it may appear, this is not an unthinkable proposition.

In the interest of guaranteeing the continued future functioning of these processes, it may be far better to incur the risk of an occasional rash disclosure than to put the final judicial seal of approval on prohibiting in any instance, the traditional use of judicial processes by those who claim their fundamental constitutional rights are being violated. It is hard to conceive of a situation where great public interest is in jeopardy in which any court would in fact exercise its discretion to require disclosure to the detriment of the public interest. Certain it is that our courts may be trusted to determine on the facts of each case as they arise whether disclosure should be required and the extent to which participation in the determination shall be accorded to counsel.

As to the second phase of the judicial function involved in this question of privilege, there exists no possibly valid reason for non-disclosure. The advice of counsel on questions of materiality, relevancy, and the like, is an integral and essential part of the judicial processes. Absent the problem of public security, there exists no reason why the judicial processes cannot be permitted to be exercised in their traditional fashion, unaffected by the fact that the government, and not a private person is the possessor of the records sought.

In conclusion, upon this point, we submit that in the very existence of this proceeding and the presentation of the instant question to this Court, lies the key to the con-

tinued existence of the American way of life. Under our Constitution, any *person* (let alone *citizen*) has recourse to our courts for an adjudication of his claims of arbitrary or unlawful government action. So long as this recourse is kept a living reality, no ideology based upon the premise that the State is supreme and the individual as against it, is without rights, be he of highest or lowest estate, can prevail. If, on the other hand, the individual, be he of high or lowly estate, is to be deprived of alleged exculpatory material at the whim of the Executive or a subordinate of his, simply because the material happens to be in the possession of an instrumentality of the government, then indeed had we best express concern for those liberties which we have always believed are part and parcel of our American birthright.

II.

Department of Justice Order 3229 as Utilized by the Department of Justice in This Case, is Inconsistent With Law, Being an Encroachment Upon the Judicial Power Vested in the Courts by Article III Section 1 of the Constitution of the United States.

Nothing is more fundamentally a part of the judicial power, than the right of a Court to compel obedience to its own process, orders and decrees. This is one of the basic and inherent attributes of a Court. It is equally clear that the determination whether in any given case reasons of public interest require non-disclosure of information, is and must be a judicial determination. Order No. 3229, as acted upon by the Department of Justice in this case, and as construed by the majority of the Court of Appeals in the decision sought to be reviewed, prohibits the Court from exercising its judicial powers and from making the determination involved.

The encroachment directly does violence to the basic constitutional principle of separation of powers. Mr. Justice Story, in his *Commentaries on the Constitution of the United States*, thus states the principle (Vol. II, p. 2):

"In the establishment of a free government, the division of the three great powers of government, the executive, the legislative, and the judicial, among different functionaries, has been a favorite policy with patriots and statesmen. It has by many been deemed a maxim of vital importance, that these powers should forever be kept separate and distinct. * * *

"Montesquieu seems to have been the first, who, with a truly philosophical eye, surveyed the political truth involved in this maxim, in its full extent, and gave to it a paramount importance and value. As it is tacitly assumed, as a fundamental basis in the constitution of the United States, in the distribution of its powers, it may be worth inquiry, what is the true nature, object and extent of the maxim and of the reasoning by which it is supported. The remarks of Montesquieu on the subject will be found in a professed commentary upon the constitution of England (Montesquieu, B. 11 ch. 6). 'When,' says he, 'the legislative and executive powers are united in the same person, or in the same body of Magistrates, there can be no liberty, because apprehension may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again there is no liberty if the judiciary power be not separated from the legislative and executive'."

As to the relative impotence of the court except in the field of judicial decision to protect its own powers, we again respectfully call to the attention of the court the excerpt from Mr. Justice Story's *Commentaries on the Constitution of the United States*, Vol. II, page 23 set forth on pages 14-15 of the Petition filed in this case.

The Doctrine of Separation of Powers was adopted by the convention of 1787 to preclude the exercise of arbitrary

power (dissenting opinion of Mr. Justice Brandeis in *Myers v. United States*, 272 U. S. 52 (293) (referred to in Petition, page 17)) and one of the basic thoughts in the minds of the framers of our constitutional government was the prevention of the accumulation of all powers, legislative, executive, and judicial, in the same hands. This accumulation, as is pointed out in the Federalist No. 47, quoted in Mr. Justice Story's Commentaries, Vol. II at page 6, might "be justly pronounced the very definition of tyranny".

This Court in *Marbury v. Madison*, 1 Cranch, 137 (1803) asserted and exercised its inherent power to require employees of the executive branch of the government to comply with its processes. There the issue arose upon the objection of the Attorney General (who had formerly been Acting Secretary of State) and of certain clerks to testify in the case. The proceedings in this regard before This Court, are thus summarized in 1, Dallas 3rd Edition (1854), 267 at p. 268:

"Mr. Jacob Wagner and Mr. Daniel Brent, who had been summoned to attend the court and were required to give evidence, objected to be sworn, alleging that they were clerks in the Department of State, and not bound to disclose any facts relating to the business or transactions of the office.

"The Court ordered the witnesses to be sworn and their answers taken in writing, but informed them that when the questions were asked they might state their objection to answering each particular question, if they had any.

"Mr. Lincoln, who had been the Acting Secretary of State, when the circumstances stated in the affidavit occurred, was called upon to give testimony. He objected to answering. The questions were put in writing.

"The Court said there was nothing confidential required to be disclosed. If there had been, he was not obliged to answer it, and if he thought that anything

was commanded to him confidentially, he was not bound to disclose, nor was he obliged to state anything that would criminate himself."

After the court's ruling, Mr. Lincoln took the stand and as appears from the report of the proceedings in 1 Cranch 137, at p. 144 answered all questions put to him, except one in connection with which he professed lack of knowledge.

In considering the import of the remarks of the Court as to the "confidential" matters involved in the case, the Court's attention is also called to the distinction between political and non-political acts of the Executive set forth in Chief Justice Marshall's opinion. Thus, Chief Justice Marshall said, after discussing purely political acts (1, Dallas at page 277):

"But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law, is amenable to the laws for his own conduct, and cannot at his discretion sport away the vested rights of others.

"The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy."

In the case at bar, no political act of the executive is involved. Instead, the case presented is one in which an individual who considers himself injured has resorted to

the laws of the country for a remedy and has sought to reach exculpatory material for the purpose of making that remedy effective. It is in the light of these facts that the propriety of compelling disclosure should, we respectfully submit, be determined and in reaching that determination, we call to the attention of the Court, the following summary by Dean Wigmore contained in his work *Wigmore on Evidence*, 3rd Edition, Section 2379 (Vol. VIII, pg. 799):

"The truth cannot be escaped that a Court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control, if its applicability is left to the determination of the very official whose interest it may be to shield a wrongdoing under the privilege. Both principle and policy demand that the determination of the privilege shall be for the Court; and this has been insisted upon by the highest judicial personages both in England and the United States."

Viewed from the standpoint of the rights of the individual as against his government, we respectfully submit that the order here under consideration, arrogating to the Executive Department alone, the absolute right to determine what documents may or may not be produced in response to court processes, should be held invalid as inconsistent with basic law.

III.

The Decision of This Court in *Boske v. Comingore*, 177 U. S. 459 Does Not Sustain the Validity of Order 3229 in the Light of the Encroachment Upon Judicial Powers Here Involved.

The majority opinion in the Court below felt that the decision of this Court in the case of *Boske v. Comingore*, 177 U. S. 459, was conclusive with respect to the validity of Order 3229. That case was not concerned with the rights of an individual asserting constitutional guaranties. This Court did not there decide that such an order was valid when production was sought in an attempt to enforce constitutional rights.

In the *Boske* case this Court had before it the validity of Treasury Department Rule X and held that the regulation prohibiting disclosure of tax data obtained by Collectors of Internal Revenue, was authorized by Section 161 of the Revised Statutes (5 U. S. Code 22), the same Statute relied upon to sustain the validity of Order 3229. That Statute is a "Housekeeping Statute". It authorizes the heads of the various departments to prescribe regulations *not inconsistent with law for the custody, use and preservation of the records, papers and property pertaining to his department*. This Court held that under the circumstances existing in the *Boske* case the Treasury Department regulation was not inconsistent with law within the meaning of the Statute.

In the *Boske* case an employee of the United States had been adjudicated in contempt of a State Court for his refusal to produce tax records sought by State taxing bodies to aid them in the collection of State taxes. He was released upon a writ of habeas corpus issued by the United States District Court and the case was heard in this Court on appeal from the order discharging the collector from custody.

We concede that within their spheres the State Courts are every bit as much a part of the judicial framework of our government as are the United States District Courts, but in considering what issues were actually decided in the *Boske* case it cannot escape attention that the matter was presented to this Court in an atmosphere colored by protection of Federal Government officials against action at the behest of state taxing authorities and that no problem of executive versus judicial power and authority was present in the case or in the minds of the Court or parties at the time it was presented.

Certainly this Court, in the *Boske* case did not purport to lay down any definitive rule of law prescribing the respective spheres of action of the Courts and the Executive Department. In considering the breadth to be accorded the *Boske* decision, the effect of the dangers to the revenue collecting facilities of the United States in the situation there present cannot be overlooked. If data furnished to United States tax collectors were immediately available to all state taxing agencies, a reluctance to furnish that data was certainly to be anticipated. No such policy element is present in this case.

Boske v. Comingore, 177 U. S. 459, did not decide that a person whose liberty was either in jeopardy or restrained might be deprived of exculpatory evidence at the will of the Department of Justice. Apparently for this reason the great bulk of the recently decided cases in the lower Courts, by use of the fiction of waiver or otherwise have made such evidence available, despite the government's claim of privilege. A number of these are collected in a footnote.*

* *Crosby v. Pacific S. S. Line*, 133 Fed. (2) 470 (1943) (C. C. A. 9th); *United States v. Grayson*, 166 Fed. (2) 863 (1948) (C. C. A. 2nd); *United States ex rel. Schluter v. Watkins*, 67 Fed. Supp. 556 (1946) (D. C. N. Y.); *Sorrentino v. United States*, 163 Fed. (2) 627 (1947) (C. C. A. 9th); *Bankline v. United States*, 163 Fed. (2) 133 (1947) (C. C. A. 2d); *United States v. Beekman*, 155 Fed. (2) 580 (1946) (C. C. A. 2d); *United States v. Krulewitch*,

Since the date of the *Boske* decision, the functions, offices and agencies of the government have expanded in a manner then undreamed of. The problem of obtaining information from governmental sources for use in pending litigation is now a constant and pressing one. Where, as in this case (Rec. 116), application is, prior to the issuance of the subpoena, made directly to the department affected, and the department is afforded ample opportunity to present its views by means of a motion to quash or otherwise, there exists no practical reason to fear embarrassment to the regular functioning of the department, and no impelling reason to prohibit the Court (which will always accord full weight to the department's views) from exercising its judicial function of determining whether the material sought should be produced.

145 Fed. (2) 76 (1945) (C. C. A. 2d); *United States v. Cohen*, 145 Fed. (2) 82 (1945) (C. C. A. 2d); *United States v. Andolschek*, 142 Fed. (2) 503 (1944) (C. C. A. 2nd); *United States v. General Motors Corp.* (D. C. Ill., 1942), 2 F. R. D. 528; *Bowles v. Ackerman* (D. C. N. Y., 1945), 4 F. R. D. 260; *O'Neill v. United States* (D. C. Pa., 1948), 79 Fed. Supp. 827, 830; *Zimmerman v. Poindexter* (D. C. Hawaii, 1947), 74 Fed. Supp. 933, 936.

Conclusion.

In conclusion we respectfully submit that Order No. 3229 of the Department of Justice, as applied in this case, is not consistent with law and that the decision of the Court of Appeals for the Seventh Circuit should be reversed and set aside and that the judgment order of the District Court should be affirmed.

Respectfully submitted,

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Attorneys for Petitioner.

APPENDIX.

“Office Of The Attorney General
Washington, D. C.

May 2, 1939.

Order No. 3229.

Pursuant to authority vested in me by R.S. 161 (U. S. Code, Title 5, Section 22), it is hereby ordered:

“All official files, documents, records and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, The Assistant to the Attorney General, or an Assistant Attorney General acting for him.

Whenever a subpoena *duces tecum* is served to produce any of such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein, on the ground that the disclosure of such records is prohibited by this regulation.

FRANK MURPHY,
Attorney General.”

**"Department of Justice
Washington 25, D. C.**

June 6, 1947.

Order No. 3229.

Supplement No. 2.

To All United States Attorneys:

**Procedure To Be Followed Upon Receiving a
Subpoena *Duces Tecum*.**

Whenever an officer or employee of the Department is served with a subpoena *duces tecum* to produce any official files, documents, records or information he should at once inform his superior officer of the requirement of the subpoena and ask for instructions from the Attorney General. If, in the opinion of the Attorney General, circumstances or conditions make it necessary to decline in the interest of public policy to furnish the information, the officer or employee on whom the subpoena is served will appear in answer thereto and courteously state to the court that he has consulted the Department of Justice and is acting in accordance with instructions of the Attorney General in refusing to produce the records. The officer or employee should bring with him a certified copy of Order No. 3229, prohibiting the unauthorized disclosure of official records, since the court does not take judicial notice of an intra-departmental order of this sort which is not published. The United States Attorney should be informed of the exact time of the subpoenaed person's appearance in court and be notified at once if there is any difficulty about persuading the court to accept the certified copy of the order as an answer to the demand to produce the records.

It is important that there should be no appearance of ar-

arbitrary refusal to comply with the subpoena and that every respect should be paid to the court's order. Therefore, the officer or employee should, unless directed to the contrary by the Attorney General, bring with him the records and documents which are called for by the subpoena even though the Department takes the position that it is not necessary to produce them. Thus, a subpoena is complied with, although a reason is offered for not actually submitting the documents requested.

It is not necessary to produce the original documents; copies of official records, removal of which the Department's own files would cause great inconvenience, are acceptable in response to a subpoena. If a subpoena is so vague and general in its terms that it would require the production of all the files with relation to a given matter, there should be a request for a more specific statement as to what is required. It is not necessary to bring the required documents into the court room and on the witness stand when it is the intention of the officer or employee to comply with the subpoena by submitting the regulation of the Department (Order No. 3229) and explaining that he is not permitted to show the files. If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed. The records should be kept in the United States Attorney's office or some similar place of safe-keeping near the court room. Under no circumstances should the name of any confidential informant be divulged.

TOM C. CLARK,
Attorney General."



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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 83

UNITED STATES OF AMERICA, EX REL., ROGER TOUHY,
PETITIONER

v.

JOSEPH E. RAGEN, WARDEN, ILLINOIS STATE PENI-
TENTIARY, JOLIET, ILLINOIS, AND GEORGE R.
McSWAIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEV-
ENTH CIRCUIT

BRIEF FOR THE RESPONDENT GEORGE R. McSWAIN
IN OPPOSITION

OPINIONS BELOW

The majority (R. 159-171) and dissenting (R. 171-173) opinions in the Court of Appeals are reported at 180 F. 2d 321.

JURISDICTION

The judgment of the Court of Appeals was entered on February 24, 1950 (R. 174). The peti-

tion for a writ of certiorari was filed on May 22, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether a Federal Bureau of Investigation agent, ordered by a subpoena *duces tecum* issued in a habeas corpus proceeding by a state prisoner to produce certain Department of Justice records, could properly be adjudged guilty of contempt for failure to obey the subpoena, where the United States Attorney, appearing for him, offered the records to the court for its examination and a ruling as to their materiality and the public interest involved in their disclosure, and the court declined to make such an examination without counsel present.

STATUTE AND REGULATION INVOLVED

R. S. § 161, 5 U. S. C. 22, provides:

The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

Department of Justice Order No. 3229, issued May 2, 1939, 11 F. R. 4920, provides:

Pursuant to authority vested in me by R. S. 161 (U. S. Code, Title 5, Section 22), it is hereby ordered:

All official files, documents, records and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, ~~are~~ to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, the Assistant to the Attorney General, or an Assistant Attorney General acting for him.

Whenever a subpoena *duces tecum* is served to produce any of such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein, on the ground that the disclosure of such records is prohibited by this regulation.

FRANK MURPHY,
Attorney General.

STATEMENT

Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois against Joseph E. Ragen, Warden of the Illinois State Penitentiary at Joliet, alleging that he was being illegally de-

tained in violation of his constitutional rights as a result of a conspiracy between certain authorities of the State of Illinois and of Cook County, Illinois, whereby he was tried, convicted and sentenced to imprisonment for 99 years for the alleged kidnaping of one John (Jake the Barber) Factor, a crime which petitioner claimed never occurred (R. 2-45, 91-92). In the course of the proceedings on this petition, counsel for petitioner caused (R. 115) a subpoena *duces tecum* to be issued to "George B. McSwain, Agent in Charge—Hon. Tom C. Clark, Federal Bureau of Investigation, Bankers Building, Chicago, Illinois, c/o Otto Kerner, Jr., United States Attorney," calling for the production of "certain records of investigation made and statements of witnesses taken and procured in connection with the alleged kidnaping of John (Jake the Barber) Factor in and about Chicago, Cook County, Illinois, in the months of July and August, 1933, including specifically transcript, records, memoranda, and other data with respect to certain show ups held in the offices of the Federal Bureau of Investigation, Chicago, Illinois; on or between the dates of July 19 to July 24, 1933, inclusive, together with all copies, drafts, and vouchers relating to the said documents, and all other documents, letters, and paper writings whatsoever, that can or may afford any information or evidence in said cause" (R. 113-114). The subpoena was served upon McSwain (R. 115, 135)

and upon United States Attorney Kerner "as the representative of the Department of Justice in this District" (R. 134).

On the return date of the subpoena, Mr. Kerner appeared for McSwain, Mr. Johnstone appeared for petitioner, and attorneys from the office of the Attorney General of Illinois and the office of the State's Attorney of Cook County appeared for Warden Ragen (R. 114). Called by Johnstone as his first witness, Kerner replied as follows to the query whether he had produced the documents requested: "We have not produced the documents requested by the subpoena, in compliance with Department of Justice Order No. 3229, and also by Supplement No. 2 dated June 6, 1947." He went on to refer to instructions he had received from the Attorney General, in a letter signed by Assistant Attorney General Alexander M. Campbell, to the effect that he should "decline to produce the records" and "proceed in accordance with the instructions given in Supplement No. 2 of Order No. 3229" (R. 115-116).¹

¹ Supplement No. 2, issued June 6, 1947 (R. 120-121), reads:
 "To All United States Attorneys:
 "Procedure to Be Followed upon Receiving a Subpoena Duces
 Tecum

"Whenever an officer or employee of the Department is served with a subpoena duces tecum to produce any official files, documents, records or information he should at once inform his superior officer of the requirement of the subpoena and ask for instructions from the Attorney General. If, in the opinion of the Attorney General, circumstances or conditions make it necessary to decline in the interest of public policy to furnish the information, the officer or employee on whom

Judge Barnes read the subpoena, and in response to his query as to whether Johnstone wanted "anything in addition pursuant to that last clause," Johnstone replied: "No, sir. Specifically, I want the records of the show ups" (R. 118-119).

the subpoena is served will appear in court in answer thereto and courteously state to the court that he has consulted the Department of Justice and is acting in accordance with instructions of the Attorney General in refusing to produce the records. The officer or employee should bring with him a certified copy of Order No. 3229, prohibiting the unauthorized disclosure of official records, since the court does not take judicial notice of an intra-departmental order of this sort which is not published. The United States Attorney should be informed of the exact time of the subpoenaed person's appearance in court and be notified at once if there is any difficulty about persuading the court to accept the certified copy of the order as an answer to the demand to produce the records.

"It is important that there should be no appearance of arbitrary refusal to comply with the subpoena and that every respect should be paid to the court's order. Therefore, the officer or employee should, unless directed to the contrary by the Attorney General, bring with him the records and documents which are called for by the subpoena even though the Department takes the position that it is not necessary to produce them. Thus, a subpoena is complied with, although a reason is offered for not actually submitting the documents requested.

"It is not necessary to produce the original documents; copies of official records, removal of which from the Department's own files would cause great inconvenience, are acceptable in response to a subpoena. If a subpoena is so vague and general in its terms that it would require the production of all the files with relation to a given matter, there should be a request for a more specific statement as to what is required. It is not necessary to bring the required documents into the court room and on the witness stand when it is the intention of the officer or employee to comply with the subpoena by submitting the regulation of the Department (Order No. 3229) and explaining that he is not permitted to show the files. If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed. The

After the court inquired about the regulations in regard to the production of the documents, Kerner read Department of Justice Order No. 3229, Supplement No. 2, and 5 U. S. C. 22 (R. 119-121). After the judge stated he could not determine whether the documents were material until he saw them and Kerner agreed that this was correct, the following occurred (R. 123):

By the Court: Now what? Is this relator to be deprived of having his counsel look at them?

* * * * *

By Mr. Kerner: It is a matter of discretion with the Court to ascertain whether or not they are material, and I will provide them for the Court's personal persual.

By the Court: What can I do in looking at them without counsel looking at them? He cannot make his record on that.

By Mr. Kerner: Well, I am standing on my instructions that I cannot produce them, on orders of the Attorney General.

Following a discussion by the court and counsel as to legal authorities, the court said (R. 124-125):

I am of the opinion that the regulation as drafted is broader than the statute permits.

records should be kept in the United States Attorney's office or some similar place of safe-keeping near the court room. Under no circumstances should the name of any confidential informant be divulged.

TOM C. CLARK,
- Attorney General."

because the statute provides that these regulations shall only be valid to the extent that they are "consistent with law."

Now I cannot believe that any department head, no matter how exalted he may be, can say to the courts that the records of his department may not be available to the investigation of questions heard in the courts. That cannot be true. And whether or not these particular papers in question here are material, I don't know. But the parties to this proceeding have a right to have somebody other than the Department determine that question.

I would be very glad if this Court were not called upon to determine it, but apparently it is. And I want to proceed to determine that question. I want the advice of counsel in respect of my determination of it. I cannot look at these papers without the advice of counsel, without counsel advising me in what particular they may or may not be material. I want the advice of counsel for the relator, and I want the advice of counsel for the respondent. * * *

* * * * *

Now, howsoever you want to meet that question is all right with me. I am ready to rule on it. * * * If you can suggest a method whereby I can rule effectively I will be very glad to have it.

Kerner's suggestion, agreed to by all counsel, was that he should produce the documents before the judge in chambers with counsel present and read them (R. 125).

At the conference in the judge's chambers, Kerner stated that he would prefer his disclosures to be off the record because of "the dangerous character of certain things that I am going to reveal."² Johnstone then stated: "As far as I am concerned, I am perfectly willing to have the United States Attorney submit the material to the Court, and abide by the result. * * * I feel that the rule in these cases should be that the material should be submitted to the court in order that the Court as a judicial officer might determine whether or not it should be produced in a given case." The court suggested: "Suppose we do this then, if that is satisfactory—suppose Mr. Kerner produces the material which is within the reach of the subpoena and submits it to counsel for the relator and to counsel for the respondent, and then you can look at it, and then if you have any controversy about it I will act on it, otherwise—." Kerner then interposed to suggest that he was "still under orders not to actually produce the documents." (R. 126-127.)

After Kerner's statement that production of the records might be instrumental in causing the death of certain confidential informants (R. 127; see also R. 129), he asserted that the only item of any possible relevance in the habeas corpus proceeding was the report on the F. B. I. "show up." John-

² Later, at Kerner's suggestion, the court ordered that the proceedings in chambers be made part of the record (R. 140).

stone agreed. (R. 128.) Counsel continued (R. 129):

By Mr. Johnstone: Well, my information is that Factor was there, and Factor would not identify my client Roger Touhy at that show up. And that is the formal fact that I want to determine.

By Mr. Kerner: I will tell you what this statement contains. It is purely a report, and is not evidence, of course. I think we will all agree with that. Factor did not identify him by face. He identified him by voice. And that is all that is in all of these reports that would be of any value anywhere along the line.

After a disagreement between Kerner and Johnstone as to whether this report would be admissible, Kerner remarked that he was "interested in the production of everything that is possible to assist you with your case," and also expressed the desire, concurred in by Johnstone, that they could reach "an agreement for the Judge to look over this one report" (R. 129-130). Responding to Johnstone's inquiries, Kerner promised to supply him with certain information not in the subpoenaed records, i. e., the date when the F. B. I. files on petitioner's case were closed and the circumstances under which petitioner was taken to Elkhorn, Wisconsin, instead of being kept in Illinois. After Kerner had again voiced his fear that production of all the documents in open court would "probably

bring about the death of someone," the following occurred (R. 131):

By Mr. Johnstone: After all, this is a habeas corpus proceeding. And in a habeas corpus proceeding the broadest possible latitude is given to the trial court. The trial court can examine witnesses, affidavits, depositions, and what have you, all to the end that essential justice may be done.

My own feeling is that the proper thing to do would be to permit the Court to examine these things without any of us.

By the Court: I don't want to see them—I don't want to see them without counsel.

Kerner then informed Johnstone that Factor was present at only one show up on July 22, 1933, and that the others present were the persons who were with him the night he was kidnaped. In addition, Kerner disclosed the presence of one Devereux who was described as the agent who made the F. B. I. report involved, Mrs. Factor, Jerome Factor, Epstein and Reddick, who were described as persons "who looked at Touhy." (R. 131-133). Thereupon, Johnstone told the court he did not see how anybody could possibly be injured by producing the reports, to which Kerner answered: "They won't be injured in fact because I want to try to bring this information to you in an informal fashion, because my orders are that I cannot produce these reports. But I am trying to help you as much as I can. * * * I have told

you that before. And that is still my position. If that information is of any value to you, here it is. But I cannot produce the reports." Johnstone then requested the court to require that the Deve-reux report be produced, whereupon the following colloquy occurred (R. 133-134);

By the Court: I guess I misunderstood Mr. Kerner this morning. I got the impression, maybe because I wanted to do it, that he was going to submit to counsel, for the consideration of counsel, the papers which are called for by this subpoena; and I understood that counsel would make no announcement of anything in those papers other than such as was really material to the issues before the Court. But I guess I misunderstood you.

By Mr. Kerner: I did not intend actually to bring the reports in because I was still under the orders of the Department.

By the Court: Well, I misunderstood you. Now, I will say to you frankly, if he really insists on this I will use all the power I have to get them.

After the proceedings were resumed in open court, Johnstone made a motion that McSwain be directed to produce the documents specified in the subpoena. Kerner made an objection, not ruled upon by the court, that the service of the subpoena upon him was bad as not constituting valid service upon the Attorney General. (R. 134.) From the witness stand, in response to Johnstone's query as to whether he would produce the documents designated in the subpoena, McSwain

stated: "I must respectfully advise the Court that under instructions to me by the Attorney General that I must respectfully decline to produce them, in accordance with Department Rule No. 3229." The court having announced its intention of holding McSwain guilty of contempt, Kerner advised: "May it please the Court, as counsel for McSwain I too have been in touch with Washington, and we cannot produce those reports, although we should like to, under order from the Attorney General, under Order 3229." (R. 135-136.)

McSwain was adjudged guilty of contempt of court and he was committed to the custody of the Attorney General until he should obey the court's order by producing the records demanded by the subpoena (R. 144-145).

On appeal (R. 146), the Court of Appeals, one judge dissenting, reversed the order of the District Court and remanded the cause with directions that McSwain be discharged from the custody of the Attorney General (R. 174).

ARGUMENT

1. In response to the subpoena *duces tecum* directed to him and the Attorney General, the respondent, McSwain, through the United States Attorney, tendered the sought-after documents to the court "for determination as to [their] materiality to the case and whether in the best public interests the information should be disclosed." Supplement No. 2, set out *supra*, note 1. While the trial judge rejected this tender, petitioner,

throughout this litigation, has expressed his satisfaction with the course proposed by the Government. Thus, as the Statement reveals, petitioner's counsel told the trial court: "As far as I am concerned, I am perfectly willing to have the United States Attorney submit the material to the Court, and abide by the result." (R. 126-127). "My own feeling is that the proper thing to do would be to permit the Court to examine these things without any of us." (R. 131). In the light of this position thus taken and adhered to, petitioner cannot and does not complain of the judgment below except to question the finding of the court below that the Government had, in fact, made the tender described.³ The correctness of that factual appraisal is obviously a question of significance only in this case.

³ That is to say, petitioner follows Judge Lindley, dissenting, in the view that McSwain did not in fact tender the subpoenaed documents to the trial court for a determination of their materiality and whether their non-disclosure was essential to the public interest. (R. 172; Pet. 26). But the record reveals that United States Attorney Kerner had acted for McSwain throughout the entire colloquy before the latter took the stand, and the court had held unequivocally that it would not examine the documents to determine their admissibility unless this were done with counsel (R. 131). In these circumstances, it would have been futile for McSwain to offer the documents again for limited examination by the court alone. As the majority opinion states, the court's previous refusal to examine the documents alone "perhaps accounts for the fact that McSwain when on the stand was not requested to make production for such purpose," i.e., for the court "to examine the material for the purpose of determining its materiality and whether it was in the best public interest that such information should be disclosed" (R. 171).

2. Petitioner's basic complaint to this Court is grounded on an incident which took place after the decision of the court below. Relying upon a statement in the Reply Brief for the United States in *United States of America v. Cotton Valley Operators Committee, et al.*, No. 490, October Term, 1949, affirmed *per curiam* by an equally divided court on April 24, 1950, 339 U. S. 940, petitioner now argues that Supplement No. 2,⁴ pursuant to which the Government took the course that it did in this case, "is not * * * a binding regulation." (Pet. 25). But petitioner misapprehends the import of the Government's statement to this Court in the *Cotton Valley* reply brief. It is one thing to say, as the Government did in that case, that Supplement No. 2 creates no rights in those seeking to obtain confidential government papers, that "In no sense does it bind or obligate the Attorney General." See Pet. 25, quoting the *Cotton Valley* reply brief. It is quite another to suggest, as petitioner does, that Supplement No. 2 or the procedures it outlines is unavailable to the Government and that the Government must, in all cases, stand or fall on an absolute executive privilege. In other words, there is no warrant whatever for suggesting that the Attorney General may not in his discretion waive the executive privilege entirely or on terms.

3. The terms offered in this case, in accordance with Supplement No. 2, were acceptable to peti-

⁴ See *supra*, note 1.

tioner, the majority of the court below, and Judge Lindley, dissenting.⁵ With petitioner's erroneous reading of the Government's *Cotton Valley* reply brief out of the way, there is plainly no warrant for review by this Court of a course of action acceptable to all parties.⁶

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

JAMES M. MCINERNEY,
Assistant Attorney General.

STANLEY M. SILVERBERG,
*Special Assistant to the
Attorney General.*

ROBERT S. ERDAHL,
ROBERT G. MAYSACK,
Attorneys.

JUNE, 1950.

⁵ " * * * the Department of Justice, acting under power granted by the Congress, has provided by its own directives, a method by which, by judicial decision, the rights of a person seeking to procure evidence in the custody of the Department, are fully protected. In other words, those directives, having provided reasonable protection for the rights of applicants, satisfy constitutional demands." (R. 171-172, dissenting opinion by Judge Lindley.)

⁶ Since there was not, in this case, an unqualified refusal to produce the documents involved, questions raised by the petitioner as to the validity of Department of Justice Order 3229, providing for non-disclosure, and the judicial power, under the Constitution, to go behind an executive determination that disclosure should not be made (Pet. 4, 14-24), are not presented for decision.





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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 83

**UNITED STATES OF AMERICA, EX REL. ROGER TOUHY,
PETITIONER**

v.

**JOSEPH E. RAGEN, WARDEN, ILLINOIS STATE PENI-
TENTIARY, JOLJET, ILLINOIS, AND GEORGE R.
McSWAIN**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT**

BRIEF FOR THE RESPONDENT GEORGE R. McSWAIN

OPINIONS BELOW

The majority (R. 159-171) and dissenting (R. 171-173) opinions in the Court of Appeals are reported at 180 F. 2d 321.

JURISDICTION

The judgment of the Court of Appeals was entered on February 24, 1950 (R. 174). The petition for a writ of certiorari was filed on May 22, 1950, and was granted on October 9, 1950 (R. 178). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a Federal Bureau of Investigation agent, ordered by a subpoena *duces tecum* issued in a habeas corpus proceeding by a state prisoner to produce certain Department of Justice records deemed confidential by the Attorney General, was properly adjudged guilty of contempt for failure to obey the subpoena, or whether the records sought by the subpoena were privileged.

2. Whether, in the circumstances of this case, the privilege against disclosure of confidential executive documents was so overborne by considerations of due process, fairness, and the like, as to require delivery of the departmental records sought not only to the trial court, as the Government proposed, but to counsel for the party on whose behalf the subpoena issued and who concurred in the Government's proposal.

STATUTE AND REGULATION INVOLVED

R. S. § 161, 5 U. S. C. 22, provides:

The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

Department of Justice Order No. 3229, issued May 2, 1939, 11 F. R. 4920, provides:

Pursuant to authority vested in me by R. S. 161 (U. S. Code, Title 5, Section 22), it is hereby ordered:

All official files, documents, records and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, the Assistant to the Attorney General, or an Assistant Attorney General acting for him.

Whenever a subpoena *duces tecum* is served to produce any of such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein, on the ground that the disclosure of such records is prohibited by this regulation.

FRANK MURPHY,
Attorney General.

Supplement No. 2 to Department of Justice Order No. 3229, dated June 6, 1947, provides:

To All United States Attorneys:

PROCEDURE TO BE FOLLOWED UPON RECEIVING
A SUBPOENA DUCES TECUM

Whenever an officer or employee of the Department is served with a subpoena duces tecum to produce any official files, documents, records or information he should at once inform his superior officer of the requirement of the subpoena and ask for instructions from the Attorney General. If, in the opinion of the Attorney General, circumstances or conditions make it necessary to decline in the interest of public policy to furnish the information, the officer or employee on whom the subpoena is served will appear in court in answer thereto and courteously state to the court that he has consulted the Department of Justice and is acting in accordance with instructions of the Attorney General in refusing to produce the records. The officer or employee should bring with him a certified copy of Order No. 3229, prohibiting the unauthorized disclosure of official records, since the court does not take judicial notice of an intra-departmental order of this sort which is not published. The United States Attorney should be informed of the exact time of the subpoenaed person's appearance in court and be notified at once if there is any difficulty about persuading the court to accept the certified copy of the order as an answer to the demand to produce the records.

It is important that there should be no appearance of arbitrary refusal to comply with the subpoena and that every respect should be paid to the court's order. Therefore, the officer or employee should, unless directed to the contrary by the Attorney General, bring with him the records and documents which are called for by the subpoena even though the Department takes the position that it is not necessary to produce them. Thus, a subpoena is complied with, although a reason is offered for not actually submitting the documents requested.

It is not necessary to produce the original documents; copies of official records, removal of which from the Department's own files would cause great inconvenience, are acceptable in response to a subpoena. If a subpoena is so vague and general in its terms that it would require the production of all the files with relation to a given matter, there should be a request for a more specific statement as to what is required. It is not necessary to bring the required documents into the court room and on the witness stand when it is the intention of the officer or employee to comply with the subpoena by submitting the regulation of the Department (Order No. 3229) and explaining that he is not permitted to show the files. If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its

materiality to the case and whether in the best public interests the information should be disclosed. The records should be kept in the United States Attorney's office or some similar place of safe-keeping near the court room. Under no circumstances should the name of any confidential informant be divulged.

TOM C. CLARK,
Attorney General.

STATEMENT

Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois against Joseph E. Ragen, Warden of the Illinois State Penitentiary at Joliet, alleging that he was being illegally detained in violation of his constitutional rights as a result of a conspiracy between certain authorities of the State of Illinois, of Cook County, Illinois, and of the United States, whereby he was tried, convicted, and sentenced to imprisonment for 99 years for the alleged kidnaping of one John (Jake the Barber) Factor, a crime which petitioner claimed never occurred (R. 2-45, 91-92, 109-112). In the course of the proceedings on this petition, counsel for petitioner caused (R. 115) a subpoena *duces tecum* to be issued to "George B. McSwain, Agent in Charge—Hon. Tom C. Clark, Federal Bureau of Investigation, Bankers Building, Chicago, Illinois, % Otto Kerner, Jr., United States Attorney," calling for

the production of "certain records of investigation made and statements of witnesses taken and procured in connection with the alleged kidnapping of John (Jake the Barber) Factor in and about Chicago, Cook County, Illinois, in the months of July and August 1933, including, specifically transcript, records, memoranda, and other data with respect to certain show ups held in the offices of the Federal Bureau of Investigation, Chicago, Illinois, on or between the dates of July 19 to July 24, 1933, inclusive, together with all copies, drafts, and vouchers relating to the said documents, and all other documents, letters, and paper writings whatsoever, that can or may afford any information or evidence in said cause" (R. 113-114). The subpoena was served upon McSwain (R. 115, 135) and upon United States Attorney Kerner "as the representative of the Department of Justice in this District" (R. 134).

On the return date of the subpoena, Mr. Kerner appeared for McSwain, Mr. Johnstone appeared for petitioner, and attorneys from the office of the Attorney General of Illinois and the office of the State's Attorney of Cook County appeared for Warden Ragen (R. 114). Called by Johnstone as his first witness, Kerner replied as follows to the query whether he had produced the documents requested: "We have not produced the documents requested by the subpoena, in compliance with Department of Justice Order

No. 3229, and also by Supplement No. 2 dated June 6, 1947." He went on to refer to instructions he had received from the Attorney General, in a letter signed by Assistant Attorney General Alexander M. Campbell, to the effect that he should "decline to produce the records" and "proceed in accordance with the instructions given in Supplement No. 2 of Order No. 3229" (R. 115-116).¹

Judge Barnes read the subpoena, and in response to his query as to whether Johnstone wanted "anything in addition pursuant to that last clause," Johnstone replied: "No, sir. Specifically, I want the records of the show ups" (R. 118-119). After the court inquired about the regulations in regard to the production of the documents, Kerner read Department of Justice Order No. 3229, Supplement No. 2, and 5 U. S. C. 22 (R. 119-121). After the judge stated he could not determine whether the documents were material until he saw them and Kerner agreed that this was correct, the following occurred (R. 123):

By the COURT. Now what? Is this relation to be deprived of having his counsel look at them?

* * * * *

By Mr. KERNER. It is a matter of discretion with the Court to ascertain whether

¹ See *supra*, pp. 3-6.

or not they are material, and I will provide them for the Court's personal perusal.

By the COURT. What can I do in looking at them without counsel looking at them? He cannot make his record on that.

By Mr. KERNER. Well, I am standing on my instructions that I cannot produce them, on orders of the Attorney General.

Following a discussion by the court and counsel as to legal authorities, the court said (R.124-125):

I am of the opinion that the regulation as drafted is broader than the statute permits, because the statute provides that these regulations shall only be valid to the extent that they are "consistent with law."

Now I cannot believe that any department head, no matter how exalted he may be, can say to the courts that the records of his department may not be available to the investigation of questions heard in the courts. That cannot be true. And whether or not these particular papers in question here are material, I don't know. But the parties to this proceeding have a right to have somebody other than the Department determine that question.

I would be very glad if this Court were not called upon to determine it, but apparently it is. And I want to proceed to determine that question. I want the advice of counsel in respect of my determination of it. I cannot look at these papers without the advice of counsel, without counsel advising me in what particular they may or

may not be material. I want the advice of counsel for the relator, and I want the advice of counsel for the respondent. * * *

* * * * *

Now, howsoever you want to meet that question is all right with me. I am ready to rule on it. * * * If you can suggest a method whereby I can rule effectively I will be very glad to have it.

Kerner's suggestion, agreed to by all counsel, was that he should produce the documents before the judge in chambers with counsel present and read them (R. 125).

At the conference in the judge's chambers, Kerner stated that he would prefer his disclosures to be off the record because of "the dangerous character of certain things that I am going to reveal."² Johnstone then stated, "As far as I am concerned, I am perfectly willing to have the United States Attorney submit the material to the Court, and abide by the result. * * * I feel that the rule in these cases should be that the material should be submitted to the Court in order that the Court as a judicial officer might determine whether or not it should be produced in a given case." The court suggested: "Suppose we do this then, if that is satisfactory—suppose Mr. Kerner produces the material which is within the reach of the subpoena and submits it to counsel

² Later, at Kerner's suggestion, the court ordered that the proceedings in chambers be made part of the record (R. 140).

for the relator and to counsel for the respondent, and then you can look at it, and then if you have any controversy about it I will act on it, otherwise——." Kerner then interposed to suggest that he was "still under orders not to actually produce the documents." (R. 126-127.)

After Kerner's statement that production of the records might be instrumental in causing the death of certain confidential informants (R. 127; see also R. 129, 131), he asserted that the only item of any possible relevance in the habeas corpus proceeding was the report on the F. B. I. "show up." Johnstone agreed. (R. 128.) Counsel continued (R. 129):

By Mr. JOHNSTONE: Well, my information is that Factor was there, and Factor would not identify my client Roger Touhy at that show up. And that is the formal fact that I want to determine.

By Mr. KERNER: I will tell you what this statement contains. It is purely a report, and is not evidence, of course. I think we will all agree with that. Factor did not identify him by face. He identified him by voice. And that is all that is in all of these reports that would be of any value anywhere along the line.

After a disagreement between Kerner and Johnstone as to whether this report would be admissible, Kerner remarked that he was "interested in the production of everything that is possible to assist you with your case," and also expressed

the desire, concurred in by Johnstone, that they reach "an agreement for the Judge to look over this one report" (R. 129-130). Responding to Johnstone's inquiries, Kerner promised to supply him with certain information not in the subpoenaed records, i. e., the date when the F. B. I. files on petitioner's case were closed and the circumstances under which petitioner was taken to Elkhorn, Wisconsin, instead of being kept in Illinois. After Kerner had again voiced his fear that production of all the documents in open court would "probably bring about the death of someone," the following occurred (R. 131):

By Mr. JOHNSTONE: After all, this is a habeas corpus proceeding. And in a habeas corpus proceeding the broadest possible latitude is given to the trial court. The trial court can examine witnesses, affidavits, depositions, and what have you, all to the end that essential justice may be done.

My own feeling is that the proper thing to do would be to permit the Court to examine these things without any of us.

By the COURT: I don't want to see them—I don't want to see them without counsel.

Kerner then informed Johnstone that Factor was present at only one show up on July 22, 1933, and that the persons who were with him the night he was kidnaped were also present. In addition, Kerner disclosed the presence of one Devereaux, who was described as the agent who made the

F. B. I. report involved, Mrs. Factor, Jerome Factor, Epstein and Reddick, who were described as persons "who looked at Touhy" (R. 131-133). Thereupon, Johnstone told the court he did not see how anybody could possibly be injured by producing the reports, to which Kerner answered: "They won't be injured in fact because I want to try to bring this information to you in an informal fashion, because my orders are that I cannot produce these reports. But I am trying to help you as much as I can. * * * I have told you that before. And that is still my position. If that information is of any value to you, here it is. But I cannot produce the reports." Johnstone then requested the court to require that the Devereaux report be produced, adding that "Mr. Devereaux is in the city and is subject to subpoena. I have a subpoena made out for him." (R. 133.) Thereupon the following colloquy occurred (R. 133-134):

By the COURT: I guess I misunderstood Mr. Kerner this morning. I got the impression, maybe because I wanted to do it, that he was going to submit to counsel, for the consideration of counsel, the papers which are called for by this subpoena; and I understood that counsel would make no announcement of anything in those papers other than such as was really material to the issues before the Court. But I guess I misunderstood you.

By Mr. KERNER: I did not intend actually to bring the reports in because I was still under the orders of the Department.

By the COURT: Well, I misunderstood you. Now, I will say to you frankly, if he really insists on this I will use all the power I have to get them. * * *

After the proceedings were resumed in open court, Johnstone made a motion that McSwain be directed to produce the documents specified in the subpoena. Kerner made an objection, not ruled upon by the court, that the service of the subpoena upon him was bad as not constituting valid service upon the Attorney General. (R. 134.) From the witness stand, in response to Johnstone's query as to whether he would produce the documents designated in the subpoena, McSwain stated: "I must respectfully advise the Court that under instructions to me by the Attorney General that I must respectfully decline to produce them, in accordance with Department Rule No. 3229." The court having announced its intention of holding McSwain guilty of contempt, Kerner advised: "May it please the Court, as counsel for McSwain I too have been in touch with Washington, and we cannot produce those reports, although we should like to, under order from the Attorney General, under Order 3229." (R. 135-136.)

McSwain was adjudged guilty of contempt of court and he was committed to the custody of the

Attorney General until he should obey the court's order by producing the records demanded by the subpoena (R. 144-145).

On appeal (R. 146), the Court of Appeals, one judge dissenting, reversed the order of the District Court and remanded the cause with directions that McSwain be discharged from the custody of the Attorney General (R. 174). Its view was that the records sought were privileged (R. 168), that the privilege had in this case been waived insofar as the Attorney General had, under Supplement No. 2, *supra*, pp. 3-6, agreed to submission of the material "to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed" (R. 168-170), that the trial court had refused this tender, and that "McSwain was not required to produce for any other purpose" (R. 171).

SUMMARY OF ARGUMENT

I

The F. B. I. records here ordered produced were privileged documents.

A. The privilege against disclosure which the Attorney General here asserted is directly supported by R. S. § 161, which authorizes the head of a department to prescribe regulations not inconsistent with law for the government of his department and the custody, use, and preservation of the records pertaining to it. Pursuant to

this authority, the Attorney General promulgated an order designating all official files and documents as confidential and forbidding disclosure except in the discretion of the Attorney General. *Boske v. Comingore*, 177 U. S. 459, directly establishes both that R. S. § 161 authorizes the ~~Attorney General's order~~ and that this exercise of the authority granted by Congress is constitutional. The Government was not a party to the proceedings in the district court in this case. Therefore, the *Boske* decision squarely governs the case at bar. Decisions holding that where the Government institutes criminal proceedings it may not, in reliance on what would otherwise be a privilege to refrain from producing confidential files, refuse to produce such files where their production is vital to the accused's defense, are distinguishable. Similarly distinguishable is the district court decision which was affirmed *per curiam* by an equally divided Court in *United States v. Cotton Valley Operators Committee, et al.*, 339 U. S. 940.

B. R. S. § 161 is a reflection of the constitutional independence of the executive. The immunity from disclosure of materials deemed confidential by the executive has been consistently and successfully asserted as against congressional demands, and has been honored by the federal courts since the earliest days of the Republic. That the executive privilege is constitutionally supported is evidenced, too, by the recognition

accorded it by state legislatures and courts, as well as in the British law (see *Duncan v. Cammell, Laird & Co.* (1942) A. C. 624).

C. The privilege thus granted to the executive reflects an established public policy based upon several elements. Among them are the efficient administration of the government free from interference, secrecy of matters of national security, protection of communications by informants, as well as the independent functions of the executive and the judiciary. Whether the public interest permits disclosure is normally for the executive to determine. For it is executive officers who are responsible for the administration of the laws and who are in a position to evaluate the importance of keeping confidential particular information sought, in relation to an entire course of government policy or action.

II

A. The Department of Justice, pursuant to Supplement No. 2 to Order No. 3229, tendered the subpoenaed documents for the personal perusal of the court for determination as to their materiality and whether in the best public interests they should be disclosed. This procedure was specifically stated by counsel for the relator to be entirely satisfactory to him. And he was the person, it must be remembered, who caused the issuance of the subpoena.

B. The Government, moreover, through the United States Attorney, did everything in its power to cooperate with counsel for the relator and, indeed, supplied him with the information he sought to elicit from the subpoenaed files. Relator was not prejudiced by the denial of the files themselves; he was given all the information in them to which he was legitimately entitled.

C. Under these circumstances, there is no occasion to inquire whether, when, and under what circumstances, the executive privilege may be overborne by countervailing considerations. The United States Attorney's recital from the records of the information sought by the relator, and the Attorney General's agreement to submit the records to the trial court, fully answered the necessities of the situation. To insist on complete disclosure would benefit the relator not at all and would unnecessarily intrude upon the very important and long-established executive privilege. Since, as the court below held, the trial court should have accepted the Government's tender, it erred in committing McSwain for contempt.

ARGUMENT

I

THE F. B. I. RECORDS WHICH THE DISTRICT COURT ORDERED McSWAIN TO PRODUCE PURSUANT TO SUBPOENA WERE PRIVILEGED DOCUMENTS

A. Revised Statutes, Section 161, and a valid regulation issued thereunder, vest in the Attorney

General the power and duty to determine the privileged character of the F. B. I. records which the district court ordered to be produced.—The privilege against disclosure which the Attorney General here asserted has the direct support of statute. Section 161 of the Revised Statutes (5 U. S. C. 22), quoted *supra*, p. 2, authorizes the head of each department of the Government to prescribe regulations, not inconsistent with law, “for the government of his department” and “the custody, use, and preservation of the records, papers, and property appertaining to it.” Pursuant to the authority thus conferred, the Attorney General, in 1939, issued Department of Justice Order No. 3229, quoted at pp. 2–3, *supra*, which designates as “confidential” all official files, documents, and records in the offices of the Department of Justice, including the Federal Bureau of Investigation. The order forbids disclosure of such files, documents, and records, except in the discretion of the Attorney General or a designated official acting for him, and provides that when a subpoena *duces tecum* for the production of any such files and records is served on any employee, he shall decline to produce them unless otherwise expressly directed by the Attorney General.

If the Attorney General’s order is within the authority granted by R. S. § 161, and if the latter section, as implemented by this order, is constitutional, the F. B. I. records which the district court

ordered produced were "privileged," and the contempt judgment entered against McSwain for declining to produce them on that ground was properly set aside by the court below.³ We submit that *Boske v. Comingore*, 177 U. S. 459, directly establishes both that R. S. § 161 authorizes the Attorney General's order and that this exercise of the authority granted by Congress is constitutional.

In the *Boske* case, the Commonwealth of Kentucky had instituted a proceeding to ascertain the amount and value of whisky in bonded warehouses owned by the defendants but not listed for taxation, and to enforce state and county taxes on such whisky. The United States Collector of Internal Revenue declined to file with the state court copies of the official records showing the liquor which the defendants had deposited in, and withdrawn from, bonded warehouses. The Collector was thereupon adjudged in contempt and committed to jail until he should comply with the court's demand. A federal district court released him on writ of habeas corpus, and, on appeal from the order of release this Court held that the Collector had properly refused to produce the records since the regulations of the Treasury Department forbidding their disclosure were binding and valid.

³ The question of the impact of Supplement No. 2 to Order No. 3229 (quoted, *supra*, at pp. 3-6), and possible accommodation of the executive privilege to countervailing claims, is treated under point II, *infra*, pp. 44-58.

The Treasury regulation, like Order No. 3229 of the Attorney General, recited that disclosure of such records by a Collector is held to be contrary to public policy and not permitted, and that process issued for their production by a state or federal court should be directed to the Secretary for authentication and transmittal of the documents "unless it should be found that circumstances or conditions exist which makes it necessary to decline, in the interest of the public service, to furnish such a copy" (177 U. S. at 461).

The Court stated that if this regulation was authorized by the statute, and if the statute was constitutional, the state authorities were without jurisdiction to compel the Collector to violate it. It was pointed out (177 U. S. at 467-468) that the Secretary was authorized by the statute to make regulations, not inconsistent with law, for the custody, use and preservation of such records, and it was held that the statute, R. S. § 161, was a valid exercise of congressional power under Article I, Section 8.

Turning to the question whether the regulation was inconsistent with law, within the meaning of the phrase as used in R. S. § 161, the Court stated: "There is certainly no statute which expressly or by necessary implication forbade the adoption of such a regulation. This being the case, we do not perceive upon what ground the regulation in question can be regarded as inconsistent with law * * * " (p. 469). The Court commented that

“reasons of public policy may well have suggested the necessity * * * of not allowing access to the records * * * except as might be directed by the Secretary * * *.” The interests of taxpayers as well as the functions of the Treasury Department might be affected adversely if disclosure were not so limited. The Court concluded that “At any rate, the Secretary deemed the regulation in question a wise and proper one, and we cannot perceive that his action was beyond the authority conferred upon him by Congress” (p. 470).

Boske v. Comingore has been followed by a series of lower court decisions in similar and related situations. See *Ex parte Sackett*, 74 F. 2d 922 (C. A. 9); ⁴ *In re Valecia Condensed Milk Co.*, 240 Fed. 310 (C. A. 7); *Walling v. Comet Carriers*, 3 F. R. D. 442 (S. D. N. Y.); *Federal Life Ins. Co. v. Holod*, 30 F. Supp. 713 (M. D. Pa.); *Stegall v. Thurman*, 175 Fed. 813 (N. D. Ga.); *In re Lambertson*, 124 Fed. 446 (W. D. Ark.).⁵ The case at bar, it is submitted, is squarely governed by the *Boske* case and its

⁴ The *Sackett* case held that government files in the possession of a subordinate official (an F. B. I. agent-in-charge, as in the case at bar) were immune from subpoena in a private antitrust action for damages, even though the documents sought were copies of records of the defendant which, it was alleged, the defendant had destroyed.

⁵ See also *In re Weeks*, 82 Fed. 729 (D. Vt.), and *In re Huttman*, 70 Fed. 399 (D. Kans.), decided before the *Boske* case, but reaching the same result.

rationale. Here, as in *Boske*, the United States was not a party to the proceedings in the district court. For this reason, decisions like *United States v. Andolschek*, 142 F. 2d 503, 506 (C. A. 2), *United States v. Krulewitch*, 145 F. 2d 76, 78-79 (C. A. 2), *United States v. Beekman*, 155 F. 2d 580, 583-584 (C. A. 2), and *United States v. Grayson*, 166 F. 2d 863, 869-870 (C. A. 2), have no present relevance. The rationale of those cases is that where the Government brings criminal proceedings against persons for violations of the law, it may not, in reliance on what would otherwise be a privilege to refrain from producing confidential reports and records in its files, refuse to produce such documents, where their production is vital to the accused's defense. See R. 165-168, where the majority below reviewed and analyzed the cited cases and other cases similar in nature, and held that they in no way impinged upon the rule or principle of the *Boske* case.⁶ See also *infra*, pp. 44-58.

⁶ The unreported decision of the United States District Court for the Western District of Louisiana, affirmed *per curiam* by an equally divided Court in *United States v. Cotton Valley Operators Committee et al.*, 339 U. S. 940, was a case in which, like the Second Circuit cases referred to in the text, *supra*, the United States was the moving party (civil suit under the Sherman Act). There, the district court dismissed the Government's suit for failure to comply with orders, issued at the request of the defendants in pre-trial motions, to produce for their inspection certain confidential F. B. I. reports. The Government, in its brief in this Court (No. 490, O. T. 1949), conceding that the *Boske*

B. R. S. § 161 reflects the constitutional independence of the executive.—The history of R. S. § 161 makes it clear that it is considerably more than a provision for routine administration by agency heads in handling their internal house-keeping. Rather, it was intended to be a grant of independent authority, in accordance with and as part of the fabric of the constitutional plan of separation of powers. R. S. § 161 stems directly from the original organic acts establishing the executive departments (1 Stat. 28, 49, 65, 68, 553). As its history makes evident, R. S. § 161 embodies a recognition of the independence of the executive.

Under the Continental Congress, the relationship between legislature and executive had been modeled on the British system. The executive departments were, in effect, answerable to the legislature, and could be called on for an accounting. A resolution of the Continental Congress creating the Department of Foreign Affairs, whose head was appointed by and held office at the pleasure of Congress, provided:

That the books, records, and other papers of the United States, that relate to this department, be committed to his custody, to

case was distinguishable "in that the Federal Government is here, and was not there, the moving party" (pp. 34-35), argued that "that difference does not work a difference in result" (pp. 35, 57-63). As pointed out in the text, *supra*, however, this point of distinction between the *Boske* and *Cotton Valley* cases is not present here, for this case is like *Boske* in this respect.

which, and all other papers of his office, any member of Congress shall have access: provided that no copy shall be taken of matters of a secret nature without the special leave of Congress. [*Journals of the Continental Congress*, Vol. XXII (1782), pp. 87-92.]

The complete change wrought by the Constitution in establishing the three independent branches (The Federalist, Nos. XLVII, XLVIII) was reflected in R. S. § 161. See Wolkinson, *Demands of Congressional Committees for Executive Papers* (1949), 10 Fed. Bar Journal 319, 328-330. The privilege which it confers derives from the same constitutional source as, and closely parallels, the executive privilege which has consistently and successfully been asserted in response to congressional attempts to require production by the executive branch, often of the very type of documents involved in this case.¹

During the administration of President Hayes, for example, the House Judiciary Committee, under the chairmanship of Benjamin F. Butler, pointed out that all resolutions directed to the President relating to the production of records properly would contain the clause, "if in his judgment not inconsistent with the public interest." H. Rep. No. 141, 45th Cong., 3d Sess., p. 3. And the committee continued (*id.* at pp. 3 and 4):

¹ See Wolkinson, *Demands of Congressional Committees for Executive Papers* (1949) 10 Fed. Bar. J. 103-150, 223-259, 319-350.

* * * whenever the President has returned (as sometimes he has) that, in his judgment, it was not consistent with the public interest to give the House such information, no further proceedings have ever been taken to compel the production of such information. Indeed, upon principle, it would seem that this must be so. The Executive is as independent of either house of Congress as either house of Congress is independent of him, and they cannot call for the records of his action or the action of his officers against his consent, any more than he can call for any of the journals and records of the House or Senate.^s

The decision as to whether there should be compliance with a particular request was the executive's, the committee stated:

Somebody must judge upon this point. It clearly cannot be the House or its committee, because they cannot know the importance of having the doings of the executive department kept secret. The head of the executive department, therefore, must be the judge in such case and decide it upon his own responsibility to the people, and to the House, upon a case of impeachment brought against him for so doing, if his acts are causeless, malicious, willfully wrong, or to the detriment of the public interests.

^s For a recent instance of congressional assertion of independence as against the judiciary, see 96 Cong. Rec. 565-566: H. Res. 427, 81st Cong., 2d Sess.: * * * *Resolved*, That

There are many other instances of successful assertion of the executive privilege, *vis à vis* Congress, including one which gave rise to a great congressional debate, occupying the Senate for almost two weeks, during President Cleveland's first administration. 17 Cong. Rec. 2211-2814. See Sen. Misc. Doc., Vol. 7, 52d Cong., 2d Sess., pp. 235-243; 8 Richardson, *Messages and Papers of the Presidents*, pp. 375-383; 17 Cong. Rec. 4095. And while there may very well be differences in the force of the privilege when it touches the interests of parties to a judicial proceeding,*

by the privileges of this House no evidence of a documentary character under the control and in the possession of the House of Representatives can, by the mandate of process of the ordinary courts of justice, be taken from such control or possession but by its permission * * * 96 Cong. Rec. 1400, 1401; see on subsequent subpoena, H. Res. 465, 96 Cong. Rec. 1695; H. Res. 469, 96 Cong. Rec. 1765-1766.

* But see the views of Senator Jackson, later to become an associate justice of this Court (17 Cong. Rec. 2623):

"Sir, has this body, has the Congress of the United States any more authority over papers in the Executive Departments of this Government than the co-ordinate independent branch of the Government—the judiciary? The judicial department of this Government has as much power and authority over all papers in the hands of the Executive or in any Department as the entire Congress has. When the rights of individuals, affecting their life, liberty, or property, are pending before the courts, the judicial department has as much power over papers as the Senate or the whole Congress; and yet it has been universally recognized from the very foundation of this Government that the judicial department of the Government can not call for papers and

the executive's relations with Congress, if not controlling, are certainly relevant. For before a balance can be struck between claimed individual rights and an executive privilege (see *infra*, pp. 44-58), the weight to be given the privileges must be ascertained by reference to the history of its assertions and the reaction to those assertions.

Extended reference has already been made to this Court's decision in *Boske v. Comingore*, 177 U. S. 459, and the cases in which it has been followed. But, even before that decision, in *Marbury v. Madison*, 1 Cranch 137, Attorney General Lincoln, appearing as a witness, objected to answering certain questions concerning the disposition of Marbury's commission while he was Secretary of State. "On the one hand, he respected the jurisdiction of this court, and on the other, he felt himself bound to maintain the rights of the executive" (1 Cranch 143). The Court said, "they had no doubt he ought to answer. There was nothing confidential required to be disclosed. If there had been, he was not obliged to answer it; and if he thought that anything was communicated to him in confidence, he was not bound to disclose it * * *" (1 Cranch 144). Lincoln subsequently answered substantially all of the questions (1 Cranch 145).

procure them either from the resident or the head of an Executive Department at its own will, but that the discretion rests with the Executive and with the Departments how far and to what extent they will produce those papers."

When sitting at Burr's trial, Chief Justice Marshall issued a subpoena to President Jefferson for the production of a letter sent by General Wilkinson to the President, which Burr affirmed contained information vital to his defense. Jefferson ignored the subpoena and directed the United States Attorney to produce only such portions of the letter as he deemed not to be confidential (1 Robertson, *Burr's Trials* (1808), pp. 177, 180, 186-188; 1 Dillon, *Marshall: Life, Character, Judicial Services* (1903), pp. XLVI-XLIX; 9 Ford, *Writings of Thomas Jefferson* (1898) pp. 55-57 (62)). In both cases, the Court avoided treating the issue as a test of power with the executive.¹⁰

Every Attorney General considering the problem has been of the opinion that information, disclosure of which would be detrimental to the public interest, is privileged, and that the determination of the executive is conclusive. 11 Ops. A. G. 137, 142-143; 15 Ops. A. G. 378; 16 Ops. A. G. 24; 25 Ops. A. G. 326. Attorney General Jackson said (40 Ops. A. G. 45, 49):

This discretion in the executive branch has been upheld and respected by the judiciary. The courts have repeatedly

¹⁰ "In no case of this kind would a court be required to proceed against the president, as against an ordinary individual. The objections to such a course are so strong and so obvious, that all must acknowledge them." Chief Justice Marshall in 2 Robertson, *op cit. supra*, p. 536.

held that they will not and cannot require the executive to produce such papers when in the opinion of the executive their production is contrary to the public interests. The courts have also held that the question whether the production of the papers would be against the public interest is one for the executive and not for the courts to determine. *Marbury v. Madison*, 1 Cranch 137, 169; *Totten v. United States*, 92 U. S. 105; *Kilbourn v. Thompson*, 103 U. S. 168, 190; *Vogel v. Gruaz*, 110 U. S. 311; *In re Charles and Butler*, 158 U. S. 532; *Boske v. Comingore*, 177 U. S. 459; *In re Huttman*, 70 Fed. 699; *In re Lamberton*, 124 Fed. 446; *In re Valecia Condensed Milk Co.*, 240 Fed. 310; *Elrod v. Moss*, 278 Fed. 123; *Arnstein v. United States*, 296 Fed. 946; *Gray v. Pentland*, 2 Sergeant & Rawle's (Pa.) 23, 28; *Thompson v. German Valley R. Co.*, 22 N. J. Equity 111; *Worthington v. Scribner*, 109 Mass. 487; *Appeal of Hartranft*, 85 Pa. 433, 445; 2 *Burr Trials*, 533-536; see also 25 Op. A. G. 326.¹¹

The privileged nature of information acquired by public officials has been recognized by the

¹¹ Accord: American Law Institute, *Model Code of Evidence* (1942), Rule 228; 1 Greenleaf, *Evidence* (1899 ed.), Sec. 251; 3 Jones, *Evidence* (4th ed., 1938), Sec. 762. Wigmore has been of the contrary view (8 Wigmore, *Evidence* (3d ed. 1940), Sec. 2378a) since 1905 (1905 ed., Sec. 2375), although he recognizes a privilege for communications by informers and a limited class of state secrets, not clearly defined.

states in a variety of statutes protecting the confidence of communications or government documents.¹² Some fourteen states have enacted statutes providing in general terms that a public officer cannot be examined as to communications made to him in official confidence, when the public interest will suffer by disclosure.¹³ In addition, many statutes dealing with narrower classifications of official information have been enacted; among these are statutes relating to police reports of highway accidents, tax returns, reports submitted in compliance with banking laws, health reports, and many others.¹⁴ The validity of such legislation forbidding disclosure of information by public officials has been upheld by the state

¹² Aside from statutes, the courts of the several states have long recognized the privileged nature of such data. Early cases give effect to the privilege of communications from informants, and to other limitations upon the attempt to obtain evidence from state officials by court process. See notes 21, 25 and 32, *infra*, pp. 38, 42 and 56.

¹³ Calif. Code Civ. Proc. Ann. § 1881 (5) (1941); Idaho Code Ann. § 9-203 (1948); Code of Iowa § 622.11 (1946); Minn. Stat. Ann. § 595.02 (5) (West 1947); Mont. Rev. Code Ann. § 10536 (5) (1935); Neb. Rev. Stat. § 25-1208 (1948); Nev. Comp. Laws Ann. § 8975 (1929); N. D. Rev. Code § 31-0106 (1943); Ore. Comp. Laws Ann. § 3-104 (5) (1940); S. D. Code § 36.0101 (5) (1939); Utah Code § 104-49-3 (1943); Wash. Rev. Stat. Ann. § 1214 (5) (1932); and see Colo. Stat. Ann., ch. 177, § 9 (1949); Ga. Code Ann. § 38-1102 (1937).

¹⁴ For a general survey and discussion of state legislation, see Sanford, *Evidentiary Privileges against the Production of Data Within the Control of Executive Departments*, 3 Vanderbilt L. Rev. 73, 82 (1949); Note, 165 A.L.R. 1302.

courts.¹⁵ The variance in wording and coverage of particular statutes prevents any generalization as to the scope and effect of such legislation. It may be said, however, that the widespread pattern of legislation imposing restrictions upon free disclosure of this type of information indicates an accepted public policy and a recognition of the principles of the earlier court decisions and of the constitutional mandate that the executive be independent.

Nor can one ignore British judgments in the field of executive privilege. For while their constitutional system differs from our tripartite organization, they too have, as much as do we, the conflict between the demands of litigants and the necessities of executive privacy. There is available to us a most authoritative recent decision in which the problem has been thoroughly canvassed—the decision of the House of Lords

¹⁵ *Appl. of Manufacturers Trust Co.*, 269 App. Div. 108, 53 N. Y. S. 2d 923 (1945); *Oklahoma Tax Comm. v. Clendinning*, 193 Okla. 271, 143 P. 2d 143 (1943); *Hickok v. Margolis*, 221 Minn. 480, 22 N.W. 2d 850 (1946); *Fleming v. Superior Court*, 196 Cal. 344, 238 Pac. 88 (1925); *Thaden v. Bagan*, 139 Minn. 46, 165 N.W. 864 (1917); *Peden v. Peden's Adm'r*, 121 Va. 147, 92 S.E. 984 (1917); *In re Herrstein*, 20 Ohio Ops. 405, 6 Ohio Supp. 260 (1941); *Maryland Casualty Co. v. Clintwood Bank*, 155 Va. 181, 154 S.E. 492 (1930); *Samish v. Superior Court*, 28 Cal. App. 2d 685, 83 P. 2d 305 (1938); *Leave v. Boston El. Ry. Co.*, 306 Mass. 391, 28 N.E. 2d 483 (1940); *Dwelly v. McReynolds*, 6 Cal. 2d 128, 56 P. 2d 1232 (1936); *Sinonsen v. Barth*, 64 Mont. 95, 208 P. 938 (1922).—*Contra*: *In re French*, 315 Mo. 75, 285 S.W. 513 (1926).

in *Duncan v. Cammell, Laird & Co.* (1942) A. C. 624.¹⁶ The action arose out of the sinking of the submarine *Thetis*, and was brought by representatives of deceased seamen against the builders. Discovery was sought of the plans, contracts for construction, and other documents. The First Lord of the Admiralty filed an affidavit, claiming privilege from disclosure on the ground that it would be injurious to the public interest. As the Lord Chancellor put it:

My Lords, the question to be determined in this appeal is as to the circumstances in which it may be validly claimed on behalf of the Crown that documents, the production of which is demanded by regular process in a civil action, should not be produced on the ground that it would be contrary to the public interest to produce them, and as to the proper procedure to be followed if this claim is to be made good. This question is of high constitutional importance, for it involves a claim by the executive to restrict the material which might otherwise be available for the tribunal which is trying the case. This ma-

¹⁶ "The importance of *Duncan v. Cammell, Laird & Co.* * * * is marked by the fact that seven members of the House of Lords sat to hear the appeal. Moreover, the unusual course was followed of delivering only a single judgment which was prepared by the Lord Chancellor after 'consultation with and contribution from' the other learned Lords" (58 *Law Quarterly Rev.* 436). The decision also disapproves *Robinson v. State of South Australia* (1931) A.C. 704.

terial one party, at least, to the litigation may desire in his own interest to make available, and without it, in some cases, equal justice may be prejudiced. The question may arise, as in the present instance, in an action between private parties, but it may also arise in a case where the Crown itself, or the Crown's representative, is a party to the suit and declines to produce a document or objects to the production of a document by the other side.

After reviewing precedents and pointing out that the rule in criminal cases might be different, the opinion states:

* * * The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This test may be found to be satisfied either (a) by having regard to the contents of the particular document, or (b) by the fact that the document belongs to a class which, on grounds of public interest, must as a class be withheld from production.

The Lord Chancellor then considers the manner in which the privilege should be raised and, a key issue in the case, whether the determination of privilege is to be made by the executive or by the court:

Two further matters remain to be considered. First, what is the proper form in which objection should be taken that

the production of a document would be contrary to the public interest? And secondly, when this objection is taken in proper form, should it be treated by the court as conclusive, or are there circumstances in which the judge should himself look at the documents before ruling as to their production?

He concludes that the privilege should be claimed by the head of the executive department:

The essential matter is that the decision to object should be taken by the minister who is the political head of the department, and that he should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced, either because of their actual contents or because of the class of documents, e. g., departmental minutes, to which they belong.

And, on the second question, after reviewing the cases, and quoting among others the statement of Lord Kinnear in *Admiralty Commissioners v. Aberdeen Steam Trawling & Fishing Co.* (1909) Sess. Cas. 335—"A department of Government, to which the exigencies of the public service are known as they cannot be known to the Court, must, in my judgment, determine a question of this kind for itself * * *,"—the Lord Chancellor states that the executive determination of privilege is conclusive on the court. The opinion

discusses the basis on which the executive determination should be made." It then outlines the consequences of the executive decision, made after due consideration:

When these conditions are satisfied and the minister feels it is his duty to deny access to material which would otherwise be available, there is no question but that the public interest must be preferred to any private consideration. * * * After all, the public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private citizen may seem to be denied what is to his im-

¹⁷ "In this connection, I do not think it is out of place to indicate the sort of grounds which would not afford to the minister adequate justification for objecting to production. It is not a sufficient ground that the documents are 'State documents' or 'official' or are marked 'confidential.' It would not be a good ground that, if they were produced, the consequences might involve the department or the government in parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the minister of the department does not want to have the documents produced. The minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be dammified; for example, where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service." (1942) A. C. at 642.

mediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation.

This decision occasioned considerable comment, both pro¹⁸ and con,¹⁹ but when the Crown Proceedings Act, 1947, 10 and 11 Geo. 6, C. 44, s. 28, authorized discovery against the Crown for the first time, it exempted any document which would, in the opinion of a Minister, be injurious to the public interest to disclose, and specifically provided for the right of the Minister to deny the very existence of such a document.

The indications from this Court's opinion in *Boske v. Comingore*, 177 U. S. 459, seem to be that R. S. § 161 reflects the executive's constitutional independence of the judiciary as much as do these provisions of the Crown Proceedings Act.²⁰

C. The right to keep confidential documents of the kind here involved gives effect to sound

¹⁸ *Production of Documents: The State and the Individual* (1942) 193 L. T. 224; 21 Can. Bar. Rev. 51; 58 L. Q. R. 31.

¹⁹ 58 L. Q. R. 436; 59 L. Q. R. 102; 20 Can. Bar. Rev. 805.

²⁰ " * * * Such order ought not to be made against the Executive of the state, because it might bring the Executive in conflict with the judiciary. If the Executive thinks he ought to testify, in compliance with the opinion of the court, he will do it without an order; if he thinks it to be his official duty, in protecting the right and dignity of his office, he will not comply even if directed by an order * * * " (*Thompson v. German Valley Railroad Co.*, 22 N. J. Eq. 111, 114 (1871).)

considerations of public policy.—The privilege granted to the executive by R. S. § 161 reflects an established public policy composed of a complex of elements. Among these are the interest in efficient administration of the Government free from interference;²¹ secrecy of matters of foreign policy, security, and national defense;²²

²¹ In libel actions based on communications to government officials relating to the business of their office, the documents "are privileged from disclosure, on the ground of public policy, and the production will not be compelled by courts of law or equity" (*Gardner v. Anderson*, Fed. Cas. No. 5220 (C. C. D. Md., 1876); *Gray v. Pentland*, 2 Serg. & Rawles 23 (Pa., 1815); *Harwood v. McMurry*, 22 F. Supp. 572 (W. D. Ky.)).

²² Cf. President Truman's directive of March 13, 1948, 13 F. R. 1359). In *Totten v. United States*, 92 U. S. 105, a contract for espionage made with President Lincoln was held to be of its nature so confidential in the public interest that suit would not lie on it. Similarly, in a contract action between private parties, military secrets are privileged in the public interest, even if privilege is not claimed by a party (*Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 Fed. 353 (E. D. Pa.); *In re Grove*, 180 Fed. 62 (C. A. 3); *Pollen v. Ford Instrument Co.*, 26 F. Supp. 583 (E. D. N. Y.)).

The Attorney General's claim of privilege for the F. B. I. reports in the public interest is at least in part based on the needs of national security. Under the Attorney General, the F. B. I. is the branch of the Government primarily responsible for the internal security of the nation. Complete confidence of informants that they will be protected is of the highest importance to effective operation in this field. Secrecy of methods, personnel, sources and techniques is necessarily closely guarded. Thus *Duncan v. Cammell, Laird & Co.* (1942) A. C. 624, 635, particularly recognizes

protection of communications by informants to officials; shielding of prospective witnesses from undue pretrial influences, particularly in criminal cases; as well as the constitutional doctrine of the independent functions of executive and judi-

that "the public interest requires a particular class of communications with, or within, a public department to be protected from production on the ground that the candour and completeness of such communications might be prejudiced if they were ever liable to be disclosed in subsequent litigation rather than on the contents of the particular document itself." In *United States v. Haugen*, 58 F. Supp. 436 (E. D. Wash.), conviction affirmed, 153 F. 2d 850 (C. A. 9), the defendant was charged with counterfeiting obligations of the United States, consisting of meal tickets for the Commissary of the Hanford Engineering Works. At that time, the nature of the business of the Hanford Engineering Works was the nation's most closely guarded secret. In order to convict the accused, it was necessary to prove that the Commissary was an agency of the United States. The Government claimed that the contract between the United States and DuPont, for operation of the plant, was privileged, but offered to introduce secondary evidence of those portions of the contract establishing the status of the Commissary. The district court permitted secondary evidence to be introduced on this point, by the testimony of a lawyer who had read the original contract (see 153 F. 2d at 852), and Haugen was convicted. There can be little question who was better qualified to determine whether, in 1944, a contract for the production of fissionable material was privileged—the district judge or the physicists and informed military men in charge of the project. And, even if the judge possessed adequate technical background to appreciate the enormity of the secret, had the court passed on the document it would, at the least, have added the judge, if not the clerk, to the select list of those having knowledge of a national secret.

ciary with which the preceding subsection of this brief was concerned.²³ Because the need for protecting the identity of confidential informants from disclosure appears to have weighed heavily in the Attorney General's decision to claim the executive privilege in this case (see *supra*, pp. 11, 12, 13, and *infra*, pp. 53-54), separate discussion of this aspect of the executive privilege would seem to be indicated.

In whatever form, free communication with private citizens is vital to the enforcement of the criminal laws. Without the cooperation of the public, many violations would not come to the attention of the Department of Justice, or could not be reached for lack of proof. The confidence of such informants in the law-enforcement arm of the Government is based in large part on the knowledge that their identity and information will be kept confidential and not made accessible to those who might wish to retaliate against the informer. The credit of the Department of Justice and the F. B. I. would be damaged se-

²³ Constitutional doctrines derive in part, of course, from considerations of public policy. And so, in a sense, this subsection of the Argument is merely an expansion of that immediately preceding. The division between the two is justified only by the fact that the preceding subsection dealt largely with what may be called institutional reasons for the executive privilege; *i.e.*, the necessary independence of the legislative, judicial, and executive branches one from another as part of a tripartite system of checks and balances—while this subsection deals with *other* policy considerations.

riously if discovery of informants' identity and the information supplied were generally permitted, with grievous consequences going far beyond the confines of this case. In some circles (*e. g.*, petty thieves, racketeers, tax evaders, as well as espionage agents, kidnapers, and the like), the fate of known informants is likely to be swift. And this case, said to arise out of a long and bitter feud between Touhy and the so-called Capone syndicate (R. 18-25), is a striking instance of the importance of protecting the identity of the Government's informants from disclosure. When it is known that conversations with the F. B. I. are quite likely to become matters of court record and subsequent publication, those conversations will be less frequent. Such news travels fast among those whose security and peace of mind depend upon maintenance of their anonymity.

The importance of protecting the anonymity of informants is thus so great that it has been given recognition as one of the prime reasons supporting the privilege of the executive not to make public its files. In *Vogel v. Gruaz*, 110 U. S. 311, 316, this Court pointed out that:

* * * it is the duty of every citizen to communicate to his government any information which he has of the commission of an offence against its laws; and
* * * a court of justice will not compel

or allow such information to be disclosed, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government, the evidence being excluded not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications.

Moreover, protection of informants' anonymity has been treated, separately, as an independent ground for exclusion. Thus, this Court has held that the identity of the informant and the nature of the information furnished "cannot be compelled without the assent of the government," *In re Quarles and Butler*, 158 U. S. 532, 536, unless it is essential to the defense. *Scher v. United States*, 305 U. S. 251, 254.²⁴

Distinct from the protection of informants but related to the problem of keeping open the

²⁴ Washington, Cir. J., in *United States v. Moses*, Feb. Cas. No. 15825 (C. C. E. D. Pa., 1827): "Such a disclosure can be of no importance to the defence in this case, and may be highly prejudicial to the public in the administration of justice, by deterring persons from making similar disclosures of crimes which they know to have been committed." Accord: *Elrod v. Moss*, 278 Fed. 123 (C. A. 4); *Arnstein v. United States*, 296 Fed. 946 (C. A. D. C.), certiorari denied, 264 U. S. 595; *Segurola v. United States*, 16 F. 2d 563 (C. A. 1), affirmed, 275 U. S. 106; *United States v. Li Fat Tong*, 152 F. 2d 650 (C. A. 2); *Worthington v. Scribner*, 109 Mass. 487; *People v. Laird*, 102 Mich. 135, 60 N. W. 457; *State v. Soper*, 16 Me. 293; *Maine v. Fortin*, 106 Me. 382, 76 A. 896.

channels of communication with the government, is the protection of the innocent from the publication of information in the hands of the government which may be entirely false or which, being fragmentary, may produce a distorted picture. The danger arises because in many investigations, in the first instance, information of any type is sought—hearsay and gossip, the true and false, the remote and the contingent. Out of such undigested “raw material,” the investigator and lawyer seek to discover the truth and to assemble evidence acceptable by legal standards. The government cannot afford to refuse the trivial and the malicious, for sometimes these lead to the important fact. Yet, by accepting them as a necessary part of an investigation, by no stretch of the imagination is credence given to them. Exposure of such trivia and falsehoods by the district court may work the gravest injury and injustice to those named. The Attorney General has consistently recognized his obligation to protect against publication of unverified accusations. It is all too apparent that later attempted exoneration seldom washes out the taint of the original unfounded accusation.

The determination of what documents should not be disclosed in the public interest is a determination necessarily within the discretion and distinctive knowledge of the executive branch. It is the executive who day in and day out is responsible for the administration of the laws and for the na-

tional security, and who is able to evaluate the importance of the particular piece of information sought in relation to an entire course of government policy or action. To the extent that the public interest is at stake in these circumstances, the public interest necessarily requires that the determination of what is privileged be made by the agency responsible for the national program for the protection of which the privilege is asserted. To divorce discretion from responsibility is in itself a denial of the public interest. See *infra*, pp. 55-56.

II

THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT HAD IMPROPERLY REFUSED TO HONOR THE EXECUTIVE PRIVILEGE UNDER THE CIRCUMSTANCES OF THIS CASE

The relator seeks to distinguish *Boske v. Comingore*, 177 U. S. 459, on the ground that the Court "was not there concerned" as it is here "with the rights of an individual asserting Constitutional guaranties" and he argues that "that decision should not be regarded as laying down a definitive rule of law establishing an absolute executive privilege." (Br. 8). We may concede, *arguendo*, that in some limited circumstances which we are not here called upon to delineate, due process may require a tempering of the absolutism of the executive privilege and an accommodation to countervailing claims demanding consideration. But there is nothing in the circumstances of this case which justifies an intru-

sion on the executive privilege beyond that deemed appropriate by the Attorney General when he directed submission of the documents to the trial court.

A. *The Government's tender of the documents to the trial court fully met the relator's demands.*—In Point I of our Argument, we sought to show that, by virtue of R. S. § 161 and a valid regulation thereunder, Department of Justice Order No. 3229, the Attorney General enjoyed an absolute privilege to refrain from producing the F. B. I. records called for by the subpoena *duces tecum*. Actually, however, in this case, the Government did not stand upon this absolute privilege. Acting pursuant to Supplement No. 2 to Order No. 3229 (*supra*, pp. 3-6), Mr. McSwain, through United States Attorney Kerner (who represented McSwain throughout the proceedings in the district court), and in response to the subpoena *duces tecum* directed to him and the Attorney General, tendered the sought-after records to the court “for determination as to [their] materiality to the case and whether in the best public interests the information should be disclosed.” Mr. Johnstone, counsel for the relator, who caused the issuance of the subpoena (*supra*, p. 6), expressed complete satisfaction with the course proposed by the Government. Thus, he told the district judge in the colloquy in the judge's chambers: “As far as I am concerned, I am perfectly willing to have the United States

Attorney submit the material to the Court, and abide by the result. * * * I feel that the rule in these cases should be that the material should be submitted to the Court in order that the Court as a judicial officer might determine whether or not it should be produced * * *” (R. 126-127). He again made his agreement with the proposed procedure crystal clear when he said: “My own feeling is that the proper thing to do would be to permit the Court to examine these things without any of us” (R. 131). The district court, however, notwithstanding this acquiescence of counsel, refused the tender, saying, “I don’t want to see them [the records]—I don’t want to see them without counsel” (R. 131).²⁵

Notwithstanding his agreement with the course proposed in the trial court, the relator now argues that “there never was an actual proffer or submission of the documents to the court for a determination of the question of public interest involved. The United States Attorney’s tender (R. 123) was, advisedly or not, limited solely to the question of materiality” (Br. 9). This argument, however, distorts the record. It is true that, at one point during the proceedings in the

²⁵ It appears that the reason for the judge’s refusal to accept the tender on the terms suggested was concern that counsel for the relator would be unable to “make his record” if he, the judge, viewed the documents in question in counsel’s absence (see R. 123). Thus, the judge was more solicitous of the relator’s rights than the relator’s own counsel.

district court, United States Attorney Kerner told Judge Barnes: "It is a matter of discretion with the Court to ascertain whether or not they [the subpoenaed documents] are material, and I will provide them for the Court's personal perusal" (R. 123). But the context plainly indicates that there was no intention on Kerner's part to offer the documents to the judge solely for his determination with respect to their materiality. It just happened that at that particular point in the discussion, as is evident from the portion of the record immediately preceding Kerner's remark, only the question of the documents' materiality was under consideration. That Kerner tendered the documents to the judge for decision both as to their materiality and as to the need for nondisclosure in the public interest is clear from the facts, that, earlier, Kerner had advised the judge that he was declining to produce the documents "in compliance with Department of Justice Order No. 3229, and also by Supplement No. 2 dated June 6, 1947" (R. 115, italics supplied); had read to the judge the letter from Assistant Attorney General Campbell directing him to "proceed in accordance with the instructions given in Supplement No. 2 of Order No. 3229" (R. 116); and had read to the judge Supplement No. 2 in its entirety (R. 120-121). Supplement No. 2 (see *supra*, pp. 3-6), directs the officer or employee upon whom a subpoena for

official files has been served, unless otherwise directed by the Attorney General, to bring them to court (but not to the witness stand), and then explicitly directs that "If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to *its materiality to the case and whether in the best public interests the information should be disclosed*" [italics supplied]. Thus, it is clear that petitioner is mistaken in now arguing that Kerner made a more limited tender of the documents than he was instructed to make by his Department superiors, through Supplement No. 2.²⁶

In the light of this qualified tender of the records in question, and the relator's counsel's express concurrence in the suggested procedure, we submit that, quite apart from the legal issue as to the executive privilege to refuse to produce the records at all (discussed in point I, *supra*, pp. 18-44), the district judge was not warranted in holding McSwain in contempt for declining to

²⁶ Of course, as the Government pointed out at p. 5 of its reply brief in *United States v. Cotton Valley Operators Committee et al.* (No. 490, October Term, 1949), this Supplement "is not a public regulation" and "[i]n no sense does it bind or obligate the Attorney General", its purpose being solely "to inform United States attorneys of procedure to be followed in the absence of specific instructions from the Attorney General." But the fact that the Supplement is not binding on the Attorney General is of no significance in this case, since here the Attorney General directed compliance with its instructions.

make an unqualified tender of the documents.²⁷

It is true that Mr. McSwain, when on the witness stand following the colloquy that occurred in the judge's chambers, did not *personally* tender the subpoenaed documents to the district judge for a determination as to their materiality and as to whether their non-disclosure was essential to the public interest.²⁸ But, manifestly, it would have been futile for McSwain to renew the offer, previously made by his counsel (Mr. Kerner), which the court had rejected, to produce the documents for limited examination by the court alone. As the majority opinion below states, the court's previous refusal to examine the documents alone "perhaps accounts for the fact that McSwain when on the stand was not requested to make production for such purpose," i. e., to enable the court "to examine the material for the purpose of determining its materiality and whether it was in the best public interest that such information should be disclosed" (R. 171).

²⁷ It should be noted that even Wigmore, who, alone among the distinguished commentators in this field, is opposed to any *general* executive privilege against disclosure of confidential office records (see fn. 11, *supra*, p. 30), agrees that such a qualified tender of records to the judge, for his private decision as to the need for non-disclosure, is the most that a litigant can demand. 8 Wigmore, *Evidence* (3d ed. 1940), § 2379.

²⁸ McSwain stated simply: "I must respectfully advise the Court that under instructions to me by the Attorney General that I must respectfully decline to produce them, in accordance with Department Rule No. 3229" (R. 135).

For these reasons, it is evident that Judge Lindley's dissent below (R. 171-173) was based on a misinterpretation of what actually transpired during the proceedings in the district court. Judge Lindley seems to have found it unnecessary to reach the "broad issue" of whether or not the Department of Justice was privileged to decline to produce the sought-after records at all (R. 171; but see R. 172-173). For, he said, "the Department of Justice * * * has provided by its own directives [i. e., by Supplement No. 2 to Order No. 3229] a method by which, by judicial decision, the rights of a person seeking to procure evidence in the custody of the Department, are fully protected. In other words, those directives, having provided reasonable protection for the rights of applicants, satisfy constitutional demands" (R. 171-172). That is to say, Judge Lindley continued, "[u]nder the pertinent administrative directive [i. e., Supplement No. 2], as I interpret it, it was the duty of [McSwain], as a subordinate in the Department of Justice, to produce the subpoenaed documents for examination by the court, in order that the latter might determine their materiality and whether their non-disclosure was essential to the public interest" (R. 172). "But," continued Judge Lindley, *"the evidence discloses that [McSwain] himself, while on the witness stand, unqualifiedly refused to produce them, and the ultimate statement of the United States Attorney plainly indicates that,*

*pursuant to instructions from his department superior, the actual records would not and could not be submitted to the court for its determination in the respects mentioned. Thus, he said expressly that he had never intended actually to produce the documents and that he could not do so under the orders of his superior. Thus, * * * [McSwain] * * * violated the directive. The inevitable result is that the Department, despite its own directive, has taken upon itself the determination of materiality and public interest and effectually prevented the court from making a judicial determination of those questions" [italics supplied] (R. 172).*

But, as we have already explained, and as recognized by the majority below, the reason for McSwain's not offering the records to the district judge for his personal examination alone was the pointlessness of such an offer in view of the judge's prior unequivocal rejection of the identical offer made by Mr. Kerner, McSwain's counsel. And Judge Lindley simply misreads the record in thinking that Mr. Kerner, the United States Attorney, refused to submit the documents to the district court "for its determination in the respects mentioned." As we have shown, this is precisely the offer which Mr. Kerner made to the court. Kerner's statements to the effect that he could not "actually produce" the documents (*supra*, pp. 11, 13, 14)—made after his tender of the documents to the court for the court's personal

perusal (*supra*, pp. 8-9)—obviously meant that he could not produce the documents in the normal manner in which documents are produced pursuant to subpoena, *i. e.*, spread them on the record for counsel and others to see.

But what the Government did offer to do was perfectly acceptable to the relator at the trial, and there was and is, consequently, no occasion to determine whether, in a case in which there is a justifiable demand for a more complete disclosure, the executive privilege would stand in the way.

B. The relator makes no showing that the necessities of his case were such as to require complete disclosure of the departmental records.—The record in this case makes clear that even had the relator expressed dissatisfaction with the course proposed by the Government, such complaint would be of no avail since his quest for information was not, in fact, rebuffed but was, instead, entirely successful.

United States Attorney Kerner, acting on behalf of Mr. McSwain, did everything in his power to cooperate with counsel for the relator in supplying him with the information he sought to elicit from the subpoenaed F. B. I. records, short of actually turning them over to him. Mr. Johnstone, the relator's counsel, made it clear that the only item in the records which he desired and which was relevant to his client's case was an F. B. I. report of a certain "show up" at which, it was believed, Factor had failed to identify his

client as the kidnaper." Mr. Kerner gave Mr. Johnstone the date of this "show up," the names of the persons present besides Factor and Touhy, and the name of the F. B. I. agent who had written up the report, one Devereaux, who was then in the city and subject to subpoena (*supra*, pp. 12-13). Kerner even told Johnstone the crucial fact the latter was interested in, *viz*, that, according to the report, Factor was unable to identify Touhy "by face," though he did identify him "by voice" (*supra*, p. 11). Kerner agreed to supply Johnstone with certain other information not contained in the records, such as the date on which the files were closed on the Touhy case, and the circumstances under which Touhy was taken to Elkhorn, Wisconsin, instead of being kept in Illinois (*supra*, p. 12). Kerner explained that everything in the records other than the the Devereaux report was worthless to Touhy, and offered to submit the records to the judge for verification of that fact (*supra*, pp. 8-9, 11)—a procedure which, as has been pointed out, was entirely satisfactory to Mr. Johnstone. And the reason, or at least the principal reason, why he could not permit Touhy or his coun-

²⁰ "By Mr. KERNER: * * * that is the part you want to know something about, the show up at the Bureau of Investigation. That is correct, is it?"

"By Mr. JOHNSTONE: That is right." (R. 128. See also pp. 8 and 11, *supra*.)

In the light of this explicit statement of the relator's needs, the trial court needed no further assistance in ascertaining what part of the records were, and what part were not, material. Cf. Relator's brief, p. 12.

sel to look at the records for themselves, Mr. Kerner explained, was the fact that they contained the names of certain confidential informants whose deaths might result if their identities became known (*supra*, pp. 11, 12).

The relator does not now, nor did he at the trial, attempt to show in what respect the information he had sought to obtain through the subpoena *duces tecum* has been denied him. The United States Attorney had revealed every fact to the relator with which he could have any legitimate concern (R. 127-134). The relator's only thought was that the "best evidence rule requires me to get the record of who was there if I can get it." (R. 129.) But the relator could not get the "best evidence" ³⁰ because it was privileged and, in such circumstances, the rules of evidence are not so inflexible as to compel either denial of the executive privilege so well established (see *supra*, pp. 18-44) or to deny to the relator the right to use the information which Mr. Kerner had culled from the departmental records for him. Indeed, in a very similar case, a criminal conviction was upheld even though (1) a fact essential to the Government's case could be shown only by a government contract, (2) that contract was secret under Army regulations, and (3) the pertinent contents of the

³⁰ It is highly doubtful that the F. B. I. report constituted the "best evidence" of who were present and what took place at the show-up. Those who were present could undoubtedly give the "best evidence". See *supra*, pp. 12-13.

contract were shown through the testimony of an army lawyer who had possession of duplicate originals of the contract. *United States v. Haugen*, 58 F. Supp. 436 (E. D. Wash.), conviction affirmed, 153 F. 2d 850 (C. A. 9). The district court's discussion of the "best evidence rule" in that case is dispositive of any fears the relator here may have harbored that, because of the "best evidence" rule, he could not utilize Mr. Kerner's statements with respect to the contents of the F. B. I. records to show what took place at the show-up. The conclusion there arrived at is well fortified by analogous rulings of this Court and other courts to the effect that "The rule requires the production of the best evidence of which the case admits and that when the evidence offered is clearly substitutionary in its nature and the unavailability of the original raises no suspicion of weakness in the substitute, the secondary evidence is admissible." *United States v. Haugen*, 58 F. Supp. 436, 439, and authorities there cited. See, particularly, *De Leon v. Territory*, 9 Arizona 161, 168-169 (secondary evidence admissible where best evidence is in the hands of a third party who, by reason of privilege, is not compellable to produce it).

C. Consequently, this Court need not decide whether, when, and in what manner the claim of executive privilege is subject to judicial review.—The balance of conflicting public interests involves a question "of high constitutional importance," *Duncan v. Cammell, Laird & Co.*,

supra, (1942) A. C. at 629, reflecting the relationship of the executive and the judiciary; it is peculiarly a problem which "should inspire caution in those intrusted with its administration to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another."³¹ It is the executive who is charged with the continuing administration of the laws and the maintenance of national security, and has the background information and technical knowledge necessary to evaluate what must not be disclosed in the public interest. In a government of separate powers, weight must be accorded to the judgment of the executive in a function primarily within his discretion, else his function is undermined.³²

³¹ Washington's Farewell Address, Richardson, *Messages and Papers of the Presidents*, Vol. I, p. 219.

³² "In other words if, from such analogy, we once begin to shift the supreme executive power, from him upon whom the constitution has conferred it, to the judiciary, we may as well do the work thoroughly and constitute the courts the absolute guardians and directors of all governmental functions whatever. If, however, this cannot be done, we had better not take the first step in that direction. We had better at the outset recognise the fact, that the executive department is a co-ordinate branch of the government, with power to judge what should or should not be done, within its own department, and what of its own doings and communications should or should not be kept secret, and that with it, in the exercise of these constitutional powers, the courts have no more right to interfere, than has the executive, under like conditions, to interfere with the courts.

It may very well be, as the materials presented in Point I of this Argument indicate, that, in the light of the considerations just stated, it is proper to give conclusive effect to a determination by the Attorney General that certain executive documents are confidential and their disclosure against the public interest. But whether and in what circumstances this is so, it seems evident that on this record and in seeking to avoid an "exercise of the powers of one department to encroach upon another", sufficient respect should at least be accorded the Attorney General's view as to constrain the courts to accept a partial disclosure which met the demands petitioner made and those he could legitimately have made. When the necessities of the situation do not require it, resolution of the inevitably delicate question of

* * * the President of the United States, the governors of the several states and their cabinet officers, are not bound to produce papers or disclose information committed to them, in a judicial inquiry, when, *in their own judgment*, the disclosure would, on public grounds, be inexpedient: 1 Greenf. on Ev., § 251; 1 Whart. Law of Ev., § 604. Thus, the question of the expediency or in expediency of the production of the required evidence is referred, not to the judgment of the court before which the action is trying, but of the officer who has that evidence in his possession.

* * * [A] judicial inquiry must always be public, the preliminary examination must give to the document that very publicity which it might be important to prevent.

* * * (Appeal of Hartranft (1877) 85 Pa. 433, 445, 447).

when, if ever, the judiciary can review the judgment of executive officers, who have also taken oaths to support the Constitution, that the public interest precludes disclosure, would be in the face of that sense of judicial abnegation which has guided this Court from the beginning.

CONCLUSION

The respondent McSwain's refusal to make an unqualified tender was proper for the reasons stated in Point I of the Argument. The conditional tender that was made met the relator's legitimate needs, as he himself recognized, and, hence, the district judge's refusal to accept the conditional tender and his decision, instead, to hold McSwain in contempt of court was error, as held by the Court of Appeals. Consequently, the judgment of the court below should be affirmed.

Respectfully submitted.

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